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The Principle of Complementarity: A New Machinery to Implement International Criminal Law

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THE PRINCIPLE OF COMPLEMENTARITY: A NEW MACHINERY TO IMPLEMENT INTERNATIONAL CRIMINAL LAW

Mohamed M. El Zeidy*

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I. THE RELATIONSHIP BETWEEN NATIONAL JURISDICTIONS & INTERNATIONAL CRIMINAL JURISDICTIONS: HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF COMPLEMENTARITY

Complementarity¹ is one of the main governing principles upon which the operation of the International Criminal Court (ICC) is premised. It is not a new concept and is consistent with the history of repression of crimes against international law. The primary responsibility for punishing these crimes lies with States, even in cases where the “international character” of the crimes urged the creation of international mechanisms for repression.

According to the doctrine of State sovereignty each State has the right to exercise its jurisdiction over crimes committed in its territory—known as the territoriality principle. Even if the crimes committed are of a type that affects the international community as a whole, States are often hesitant to have their own nationals tried by an international judicial organ. History demonstrates that States rarely waived this right, which is inherent to their sovereignties, and did not rely exclusively on international justice. Rather they always preferred to exercise their jurisdiction exclusively, and only occasionally, when coerced by special circumstances, have they accepted international intervention. In order to create an international criminal court to punish grave crimes of an international character, this historical obstacle had to be overcome. The compromise reached is the principle of complementarity. This principle requires the existence of both national and international criminal justice functioning in a subsidiary manner for the repression of crimes of international law. When the former fails to do so, the latter intervenes and ensures that perpetrators do not go unpunished.

A. *Aspects Prior & Subsequent to World War I*

Most violators of international law have been tried in domestic forums. Rarely was a tribunal created to try offenses against humankind. One notable early example occurred in Naples when Conradin von

1. See Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, pmbl. ¶ 10, U.N. Doc. A/CONF. 183/9 [hereinafter ICC Statute].

Hohenstafen, Duke of Suabia, was tried and later executed for initiating an unjust war on October 29, 1268.²

After World War I war criminals were tried in domestic courts and in U.S. military tribunals. "An effort was made to obtain many of those accused of having committed war crimes from Germany for trial in Allied Tribunals."³ According to articles 228 to 230 of the Versailles Treaty,⁴ Germany agreed to turn over suspected war criminals to the Allies for trial by Allied Tribunals. However, at the Paris Peace Conference on February 6, 1920, Kurt von Lersner, head of the German peace delegation, refused to accept the extradition list,⁵ formally demanded by France, England, Belgium, Italy, Poland, Rumania, and Serbia. This list was prepared by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, which completed its report in 1920 and submitted a list of 895 alleged war criminals to be tried by the

2. INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 707 (Jordan J. Paust et al. eds., 1996) [hereinafter INTERNATIONAL CRIMINAL LAW].

3. *Id.* at 708.

4. Treaty of Peace with Germany, June 28, 1919, arts. 228–30, S. TREATY DOC. NO. 66-49, at 90 (1919).

Article 228 stipulates:

The German Government recognizes the right of the Allied and Associated Powers to bring before military Tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a Tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under the German authorities.

Id. art. 228. Article 229 stipulates:

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military Tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military Tribunals composed of members of the military Tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.

Id. art. 229. Article 230 stipulates:

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders, and the just appreciation of responsibility.

Id. art. 230.

5. INTERNATIONAL CRIMINAL LAW, *supra* note 2, at 709; *see generally* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 199–200 (1992) [hereinafter BASSIOUNI, CRIMES AGAINST HUMANITY].

Allied Tribunals.⁶ The German Government was not very stable and this demand might have led to its overthrow. Consequently, as a compromise, the Allies agreed to accept Germany's offer to try a select number of accused offenders before its Reichsaericht Supreme Court sitting at Leipzig.⁷ The Allies maintained that even though they allowed Germany to exercise its criminal jurisdiction and try the accused in German courts, they reserved their rights under article 228 of the Versailles Treaty to set aside the German verdicts. That article required that the German Government surrender to the Allies anyone accused of having committed war crimes so that such person or persons could be tried by a special military tribunal, on an international level.⁸ Faced with this threat, Germany passed new legislation and assumed jurisdiction in order to be able to prosecute the selected offenders under national law.⁹

Germany sought the respect of its State sovereignty by exercising its criminal jurisdiction in its own national courts. The principle of complementarity can be recognized in the Treaty's commitment to try and punish offenders if Germany failed to do so. The language of article 228 of the Versailles Treaty echoes the notion of primacy, and seems to emphasize the supremacy of international tribunals over national tribunals.

6. M. CHERIF BASSIOUNI, *THE INTERNATIONAL CRIMINAL COURT: ITS ESTABLISHMENT, THE STATUTE, A STUDY OF THE HISTORICAL PERSPECTIVE OF THE INTERNATIONAL INVESTIGATIVE COMMISSIONS AND THE FORMER INTERNATIONAL CRIMINAL TRIBUNALS* 12 (2001) [hereinafter BASSIOUNI, *THE ICC: A STUDY*]; see also M. Cherif Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda*, in 2 *INTERNATIONAL CRIMINAL LAW: ENFORCEMENT* 33-34 (M. Cherif Bassiouni ed., 1999) [hereinafter Bassiouni, *From Versailles to Rwanda*]. Sources conflict as to the number of alleged war criminals listed for prosecution. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 17 (1992) (stating that the Allies presented a list of 854 individuals, including political and military figures).

7. BASSIOUNI, *THE ICC: A STUDY*, *supra* note 6, at 15; *INTERNATIONAL CRIMINAL LAW*, *supra* note 2, at 709. One could suggest that deferral to the German national courts, which was subject to subsequent intervention by the Allied Powers, would trigger the idea of complementarity.

8. Bassiouni, *From Versailles to Rwanda*, *supra* note 6, at 37; see also M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* 2 (1987). Because of Germany's reluctance to hand over accused war criminals, only forty-five cases were selected for prosecution. Germany tried only twelve defendants before its Supreme Court sitting in Leipzig and six of these defendants were acquitted. BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 5, at 201. Some argue that the Leipzig Trials demonstrated the inability and unwillingness of the German court to carry out prosecutions, since it required international interference by the Allies. The Allies were dissatisfied with the result and decided not to submit any further defendants to the German court. Instead, they conducted their own trials according to article 229 of the Versailles Treaty. However, the Allies never requested the extradition of any accused Germans, and only Belgium and France held a few *in absentia* trials. Thus the Allies' commitment to try and punish the offenders was not fulfilled.

9. Bassiouni, *From Versailles to Rwanda*, *supra* note 6, at 38; BASSIOUNI, *THE ICC: A STUDY*, *supra* note 6, at 18.

However, the Allies' subsequent agreement to defer to the German courts, rather than enforce their rights to prosecute the accused, denotes a shift from the notion of primacy to the more lenient notion of complementarity. Even in the face of the existence of international jurisdiction, the inherent, fundamental idea of national jurisdiction prevailed, despite the State's failure to fulfill its duty toward the international community.

The peace treaties with Turkey at the end of the war reflected a similar approach to dealing with accused war criminals. Article 230 of the Treaty of Sevres¹⁰ obliged Turkey to surrender those responsible for the massacres committed during the continuance of the state of war on territory forming part of the Turkish Empire on August 1, 1914. In addition, the Allied Powers reserved the right to designate a tribunal, including a court created by the League of Nations to try those responsible. The Turkish government similarly recognized the right of the Allied Powers to prosecute individuals accused of violating the laws and customs of war before domestic or mixed domestic tribunals, "notwithstanding any proceedings or prosecutions before a tribunal in Turkey."¹¹ However, the Treaty of Sevres was never ratified and thus its provisions were never implemented.¹² The Treaty of Lausanne¹³ replaced the Treaty of Sevres, but did not contain any provisions on prosecution. It reflected the Allied

10. Treaty of Peace between the Allied Powers and Turkey, Aug. 10, 1920 (Treaty of Sevres), reprinted in 15 AM. J. INT'L L. 179 (Supp. 1921) [hereinafter Treaty of Sevres].

11. *Id.* art. 226; see also BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 5, at 174; Mathew Lippman, *The Convention On The Prevention and Punishment Of The Crime Of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. LAW 415, 420-21 (1998).

12. Bassiouni, *From Versailles to Rwanda*, *supra* note 6, at 36. However, prior to the Treaty of Sevres, between April 1919 and July 1920, a Turkish Military Tribunal did prosecute and convict thirty-four offenders, of which fifteen were sentenced to death. Of these fifteen, only three were actually executed: eleven received the sentence *in absentia* and one escaped. The remaining 19 received non-death sentences. Public opinion caused the Ottoman Grand Vizir to release forty-one prisoners. This prompted Great Britain to request the transfer of the remaining detainees to British custody. Consequently, the Turkish government objected, claiming that such transfer,

[w]ould be in direct contradiction with its sovereign rights in view of the fact that by international law each State has [the] right to try its own Tribunals. Moreover, His Britannic Majesty having by conclusion of an armistice with the Ottoman Empire recognized [the] latter as a *de facto* and *de jure* sovereign State, it is incontestably evident that the Imperial Government possesses all the prerogatives for freely exercising [the] the principles inherent in its sovereignty.

Id. The quote emphasizes the idea that priority of national criminal jurisdictions always controls the thoughts of every State, and the idea of deference to international or external tribunals was resisted as well. Thus, Turkey expressed its desire to practice its jurisdiction over the offenders and made several attempts in order to reach this target. Likewise, the German experience with the Allied Powers through the Treaty of Versailles and the Paris Peace Conference demonstrates the same idea.

13. Treaty with Turkey and Other Instruments, July 24, 1923 (Treaty of Lausanne), 28 L.N.T.S. 12 [hereinafter Treaty of Lausanne].

Powers' decision to defer to Turkish claims of sovereignty, and also their concern that prosecution before an international tribunal would promote domestic instability.¹⁴

B. World War II and the International Military Tribunals

It might be argued that the International Military Tribunal (IMT) established at the end of World War II, reflected another form of the complementarity principle, and the significance of cooperation with national criminal jurisdictions. The IMT was set up to try only the major war criminals, while the bulk of the task was left to internal criminal jurisdictions. It was operated in a subsidiary manner. In the Moscow Declaration of 1943,¹⁵ the three main Allied Powers declared that the German war criminals should be judged and punished in the countries in which their crimes were committed (that is, according to the principle of territorial jurisdiction). Only "the major criminals, whose offenses have no particular geographical localization," would be punished "by joint decision of the Governments of the Allies."¹⁶ This declaration was referred to in the London Agreement of August 8, 1945¹⁷ establishing the Nuremberg Tribunal. Thus, one might conclude that the fact that the IMT judged only twenty-two accused criminals, of whom nineteen were declared guilty and three were acquitted,¹⁸ was due to the recognition of the

14. Lippman, *supra* note 11, at 421; *see also supra* text accompanying note 12, which expresses the idea of deferring to such Treaties. Another issue was the evidentiary problems impeding prosecution. Turkey, in order to mollify the Allies, initiated the largely symbolic *in absentia* prosecution of various former Cabinet Ministers and leaders of the Ittihad Party, even though they had fled the country. The former Cabinet Ministers and party leaders were subsequently convicted of the murder and pillage of the Armenians, but most received insignificant sentences.

15. The Tripartite Conference at Moscow, Oct. 19–30, 1943, *reprinted in* INTERNATIONAL CONCILIATION, No. 395, at 599–605 (1943) [hereinafter Moscow Declaration].

16. *Id.* at 601; *see also* Paolo Benvenuti, *Complementarity of the International Criminal Court to National Criminal Jurisdictions*, in 1 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 24 (William Schabas et al. eds., 1999).

17. London Agreement of Aug. 8, 1945, *reprinted in* 1 *TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 8, 8–9 (1947) [hereinafter London Agreement].

18. International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 *AM. J. INT'L L.* 172, 333 (1947). Although Hjalmar Schacht, Franz Von Papen, and Hans Fritzsche were acquitted by the IMT, they were retried before the Spruchkammer (Denazification Court) in Nuremberg. TAYLOR, *supra* note 6, at 612–14; *see also* WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES* 278 (2000). It might be argued that such a practice reflects Germany's insistence to exercise its national criminal jurisdiction. Thus, this demonstrates that States deem it important to ensure that their role in exercising their criminal jurisdiction in the repression of such crimes, which derives from their sovereignty, is not hindered by the international tribunals. Moreover, this provides a fabulous example of national justice stepping in when international justice fails. Unlike Germany, where those accused and convicted of war crimes became, for the most part, pariahs in their

role of national criminal jurisdictions. The others would “be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments”¹⁹ which would be erected therein.

[G]ermans who take part in wholesale shooting of [Polish] officers or in the execution of French, Dutch . . . or have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union . . . will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.²⁰

The IMTs represented an approach different than the one adopted at the end of World War I. The Versailles Treaty, and the deferral of jurisdiction outlined in it, reflected the direct application of the concept of complementarity, a concept later to be found in the ICC Statute. The International Tribunals of the Versailles Treaty, had a direct relationship with the German national courts, and deferred to them under the condition that the international tribunals would intervene if the German courts failed to act. The doctrine of State sovereignty played a major role in shaping this settlement.

In contrast, the IMTs reflected the principle of primacy, or the supremacy of international law over national law, in regard to trying major war criminals, particularly in the field of the core crimes.²¹ Although there was no explicit discussion concerning this issue during the judgment, there was a supremacy element to the IMT itself.²² However, due to the lack of the direct relationship between the IMT and national courts, since both had different jurisdictions and tried different

society, Japan viewed persons convicted by the International Military Tribunal for the Far East (IMTFE) as victims. Shigemitsu Mamoru, a career diplomat and a Foreign Minister in Tojo Mideki's Wartime Cabinet, serves as an example of such sentiment. Sentenced by the IMTFE to seven years imprisonment, he was released on parole in November 1950 and in November 1951, he was given clemency. Later, in 1954 he was reappointed Foreign Minister.

19. Moscow Declaration, *supra* note 15, at 604 ; *see also* London Agreement, *supra* note 17, at 8, 9 (affirming the trials of minor war criminals on the national level, where their crimes had occurred). Article 4 stipulates, “nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.” *Id.* at 9.

20. Moscow Declaration, *supra* note 15, at 604. By 1948, European countries and the United States had brought a total of 969 cases in their respective courts, involving 3,470 accused, of whom 952 were sentenced to death, 1,905 were imprisoned, and 613 were acquitted. BASSIOUNI, *THE ICC: A STUDY*, *supra* note 6, at 23.

21. *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 249 (1999) [hereinafter *Panel Discussion*] (remarks by Leila Sadat Wexler).

22. *Id.*

categories of war criminals, the complementarity principle emerged in a different form. The Tribunal tried only major criminals whose offenses had no particular geographical localization, and left the minor criminals to internal criminal jurisdictions. This task was undertaken by the Occupying Powers themselves, each within its own zone, with its own set of courts, applying its own scheme of law.²³ In order to establish a minimum common basis for the trials to be conducted in the four zones of occupation, in December 1945, the Allied Control Council, acting as a legislative body for all of Germany, enacted Law No. 10 entitled "Punishment of Persons Guilty of War Crimes, Crimes Against Peace, Crimes Against Humanity." Consequently, it was the responsibility of each zone commander to implement Law No. 10 in his zone.²⁴ This appears to be a compromise, which serves as a good example for effective cooperation in the sense of complementarity between international and national criminal jurisdictions.²⁵

*C. The Principle of Complementarity in the Drafting History
of the Genocide Convention:*

The principle of complementarity emerged in a similar form to that now present in the International Criminal Court (ICC) during and subsequent to the early experiences of the Treaty of Versailles and the IMT. However, as mentioned in the previous Section, the IMT experience reflected the practice of complementarity in different form. That is because the problems, which often arise due to the conflict between national sovereignty and international criminal jurisdiction, did not arise. During this period no tension developed between international and national jurisdictions.²⁶ However, this was to prove temporary. Nonetheless, it might be argued that the decision by Germany to retry Fritzsche, Von Papen, and Schacht subsequent to their acquittals by the IMT,²⁷ reflects and emphasizes that States often deny waiving their right to exercise their criminal jurisdiction, especially over their nationals. Although occasionally some

23. Benvenuti, *supra* note 16, at 24.

24. *Id.*

25. Otto Triffterer, *Preliminary Remarks: The Permanent International Criminal Court—Ideal and Reality*, in COMMENTARY ON THE ROME STATUTE: OBSERVERS' NOTES, ARTICLE BY ARTICLE 17, 38 (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE]. In this respect, the agreement between the four major powers fighting at that time against Germany, and those nineteen States, which in addition signed the Nuremberg Statute, was based on mutual trust. Accordingly, there was no need to centralize the prosecution so as to guarantee uniformity with an international court besides Nuremberg and Tokyo. Rather, a far-reaching complementarity existed. On both levels, the prosecution and sentencing were based on a practical division of labor.

26. *Id.* at 37.

27. See *supra* text accompanying note 18.

States are unwilling to prosecute the perpetrators, they nevertheless resist the idea of exclusive international intervention.

The drafting history of the Genocide Convention²⁸ illustrates well the aforementioned observation. The *travaux préparatoires* of the Convention reflect the two main aspects of the present study: First, the idea that even in the case of the creation of international tribunals, most States claim to exercise their own national criminal jurisdiction; and second, the concept of complementarity.

Despite the fact that article VI of the current text of the Convention is silent about the nature of the relationship between national courts and the International Penal Tribunal, the texts proposed by some of the delegates during the preparatory work reflected their intentions about such a relationship. However, others opposed the idea of creating an international tribunal. During the debates some delegates proposed exercising universal jurisdiction over the crime of genocide and establishing an international tribunal to try those perpetrating such crimes.

The first aspect, that of States affirming their right to exercise national criminal prosecution, was well represented in the Ad Hoc Committee by Mr. Morozov of the USSR. He stressed that no exception should be created, even in the case of genocide, to the principle of respecting national sovereignty by preserving a State's territorial jurisdiction.²⁹ He vigorously opposed creating an international tribunal to try the crime of genocide.³⁰ Instead, he proposed the following new language for article IX of the draft submitted by his delegation:

The Convention should provide that persons guilty of genocide shall be prosecuted as being guilty of a criminal offence; that crimes thus committed within the territory coming under the law of a [S]tate shall be referred to the national courts for trial in accordance with the internal legislation of that [S]tate.³¹

Accordingly, one may conclude that the Soviet Union held the position that only national courts should carry out such a duty. This proposal was also adopted by Mr. Perez-Perozo of Venezuela,³² and Mr. Rudzinski

28. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

29. Basic Principles of a Convention on Genocide, U.N. ESCOR, Ad Hoc Comm. on Genocide, 7th mtg., at 4, U.N. Doc. E/AC.25/SR-7 (1948).

30. *Id.* at 4–5; see also SCHABAS, *supra* note 18, at 356.

31. Basic Principles of a Convention on Genocide, *supra* note 29, at 3.

32. *Id.* at 5–6. Venezuela feared that the establishment of such a judicial body might wound national pride. It claimed the whole idea was inconsistent with the principle of respect for national sovereignty laid down in article 2(7) of the United Nations Charter.

of Poland.³³ This proposal demonstrates the fact that most States are terribly jealous about their powers of criminal prosecution. They perceive these powers as linked to the very concept of sovereignty.³⁴

The second aspect, that of complementarity was also reflected during the drafting work. One might believe that the principle of complementarity was genuinely negotiated for the first time with the initiation of the 1994 ILC Draft Statute for an ICC.³⁵ However, as the drafting history of the Genocide Convention makes evident, this is far from the truth. The Ad Hoc Committee's chair, John Maktos of the United States, was in favor of establishing an international penal tribunal to try those perpetrating genocide.³⁶ However, even this modest proposal would only provide such a tribunal with minimum powers.³⁷ Maktos proposed a rule of subsidiarity or complementarity, by which an international court would only have jurisdiction if the State with territorial jurisdiction could not, or had failed to act.³⁸ The Ad Hoc Committee adopted the principle of complementarity by four votes to none, with three abstentions.³⁹

Furthermore, in its initial proposals on the Genocide Convention, the Secretariat clearly favored establishing an international tribunal. Two options were considered. Model statutes reflecting these alternatives, based largely on the 1937 League of Nations treaty, were appended to the Secretariat's draft. The international court would hear cases if a State was unwilling to try or extradite offenders.⁴⁰ Donnedieu de Vabres and Vespasian Pella, two experts consulted by the Secretariat, decided that an

33. *Id.* at 11–12. Poland claimed that it would be premature to establish an international court. Although Poland's delegate's language does not clearly reflect the opposition of the idea of an international tribunal, one may deduce, nonetheless, that such wording implies an indirect opposition to this idea, due to the prevailing notion of State sovereignty.

34. Benvenuti, *supra* note 16, at 23. However, France conceived of an International Tribunal with exclusive jurisdiction, having no confidence in national justice systems to assume responsibility for genocide prosecutions stating, "[n]o State would commit its governing authorities to its own courts." Basic Principles of a Convention on Genocide, *supra* note 29, at 9. This idea reflects only the minority's opinion.

35. *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, Draft Statute for an International Criminal Court, U.N. GAOR, 49th Sess., Supp. No. 10, at 44, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Draft Statute].

36. Basic Principles of a Convention on Genocide, *supra* note 29, at 12–13.

37. *Id.* at 13–15.

38. *Id.*; see also SCHABAS, *supra* note 18, at 371. The Chair proposed that in order to secure as many ratifications of the Convention as possible and to allay any fears on the part of prospective signatories lest the international court, with its powers as yet undefined, infringed their sovereign rights, the Committee should decide at once upon its powers, by inserting a clause under which "the jurisdiction of the international court would be exercised in cases where it has found that the State in which the crime was committed, had not taken adequate measures for its punishment."

39. U.N. ESCOR, 8th mtg., at 15, U.N. Doc. E/AC.25/SR.8 (1948).

40. SCHABAS, *supra* note 18, at 369.

international jurisdiction should have a subsidiary or complementary status, and should be activated if national courts failed to effectively prosecute.⁴¹ In the Sixth Committee, the United States⁴² and Uruguay⁴³ urged incorporating a sentence to recognize this principle. Consequently, they proposed similar amendments.

In light of the foregoing, it might be deduced that the principle of complementarity emerged even during the early efforts to establish an International Penal Tribunal. One might suggest that such a principle is the outcome of two combined factors, namely, the respect of national sovereignty and the need to facilitate international criminal justice to repress genocide. The tension between the two desires led to the compromise, which reflects the idea of complementarity.

D. The Impact of the 1949 Geneva Conventions on the Notion of Sovereignty:

Although the 1949 Geneva Conventions did not create an international tribunal to try offenders,⁴⁴ they imposed legal obligations and

41. *Id.* at 369–70.

42. *Id.* at 373; see also *United States of America: Amendment to Article VII of the Draft Convention (E/794)*, Genocide-Draft Convention and Report of the Economic and Social Council, U.N. GAOR 6th Comm., 3rd Sess., U.N. Doc. A/C.6/235 (1948) [hereinafter U.S. Amendment to Article VII]:

Jurisdiction of the international tribunal in any case shall be subject to a finding by the tribunal that the State in which the crime was committed had failed to take appropriate measures to bring to trial persons who, in the judgment of the court, should have been brought to trial or had failed to impose suitable punishment upon those convicted of the crime.

Id. One might deduce that the United States' proposal reflects the exact conceptions of inability and unwillingness as mentioned under article 17(2) and (3) of the current ICC Statute.

43. U.S. Amendment to Article VII, *supra* note 42; see also *Uruguay: Amendments to the Draft Convention for the Prevention and Punishment of the Crime of Genocide (E/794)*, Genocide: Draft Convention and Report of the Economic and Social Council, U.N. GAOR 6th Comm., 3rd Sess., U.N. Doc. A/C.6/209 (1948):

Persons charged with genocide or any of the other acts enumerated in article IV shall be tried by the competent tribunals of the State in the territory of which the act was committed. Should the competent organs of the State which is under a duty to punish the crime fail to proceed to such punishment effectively, any of the Parties to the present Convention may submit the case to the International Court of Justice which shall decide whether the complaint is justified. Should it be proved that there has been such failure as aforesaid the Court shall deal with and pronounce judgment on the crime of genocide. For this purpose the Court shall organize a Criminal Chamber.

Id. That proposal also reflected the same conceptions of inability and unwillingness as mentioned in article 17 of the ICC Statute. However, Uruguay withdrew its amendment later after the resolution on the ICC was adopted.

44. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva

duties on nearly all States to repress these serious crimes through their national institutions. Geneva law insists on the punishment of grave breaches of international humanitarian law; however, it does not set out specific penalties, nor does it create an international tribunal. In this respect, Geneva law does not follow the example of the London Agreement, which established the Nuremberg Tribunal, or that of the Genocide Convention and its promise of an International Penal Tribunal. Geneva law makes its impact on international jurisdiction by placing a duty and an obligation upon all States to repress violations. The Geneva Conventions oblige States Parties to "undertake to respect and to ensure respect" for the Conventions in all circumstances.⁴⁵ Accordingly, States should act and cooperate with each other in the field of criminal prosecution.⁴⁶ Moreover, they must enact national legislation prohibiting and punishing grave breaches.⁴⁷ Thus, the system of repressing such violations is supposed to be carried out through the actions of national courts. This concept of the Conventions is reflected through most States' opposition to the idea of primacy or of an international tribunal enacted with exclusive jurisdiction.⁴⁸ Given the fact that the Conventions impose this duty to prosecute the authors of these crimes upon all States,⁴⁹ States will therefore often resist any attempt to deny them this duty inherent in the basic principle of sovereignty.⁵⁰ In addition, the Conventions empower States Parties with mandatory universal jurisdiction, called "adjudicative" jurisdiction, which is broader in effect than the principle of

Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1948, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

45. Article 1 is common to Geneva Conventions I-IV. See, e.g., Geneva Convention I, *supra* note 44, art. 1.

46. Benvenuti, *supra* note 16, at 28.

47. Geneva Convention I, *supra* note 44, art. 49; Geneva Convention II, *supra* note 44, art. 50; Geneva Convention III, *supra* note 44, art. 129; Geneva Convention IV, *supra* note 44, art. 146.

48. This idea is clearly reflected through the aforementioned historical development; it will be clarified further later in this Article. See Section B.3, *infra*, for a discussion of primacy and its impact on States.

49. See, e.g., International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 4(b), G.A. Res. 3068, 28 U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) [hereinafter Apartheid Convention]; see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture].

50. States not willing to take effective actions toward the perpetrators continue to operate under the idea of sovereignty. States' hesitation to act through universal jurisdiction could also serve as a good example of this principle.

territorial jurisdiction. This extends States' duties, and consequently, makes the situation more complex. All of these combined factors illustrated and strengthened States' opposition to the primacy of international jurisdiction over national jurisdiction.⁵¹

From looking at the texts and drafting histories of the Geneva and Genocide Conventions, we might deduce that the notion of State sovereignty often prevailed. It played an influential role with the majority of States, even with those who accepted the idea of a restricted international tribunal, that is, those who favored the principle of subsidiarity. Consequently, one could suggest that the aforementioned proposals reflect the implicit thoughts and intentions of most States. Some vigorously opposed the entire idea of international intervention, while others accepted the idea on the condition that the Court should complement national jurisdictions. Both of these views or ideas convene at a certain point; they have in common a strong desire to respect State sovereignty. Driven by this desire, some States refused international criminal jurisdiction, because they viewed it as a violation of national sovereignty. Others restricted international criminal jurisdiction only to situations when national courts fail to fulfill their duties. This condition is also based on the idea of State sovereignty. These views, even though they seem contradictory, lead to the same conclusion: that most States would never sign or ratify a treaty establishing an international court with exclusive jurisdiction. Therefore, the principle of complementarity seems to be the best, if not the only, compromise available to reconcile these positions.

E. The Primacy of the Ad Hoc Tribunals

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created ad hoc by a decision of the United Nations Security Council to deal with the unique situation in the former Yugoslavia.⁵² Another ad hoc tribunal, the International Criminal Tribunal for Rwanda (ICTR), was created to deal with a similarly

51. However, one might argue that, although the principle of universal jurisdiction imposes upon States a greater duty to prosecute, which by its role strengthens their existing idea about repressing such crimes, the mechanism of practicing universal jurisdiction might impede the concept of sovereignty. For example, one State might prosecute a national of another State without any links at all. One might argue that such tension between States, which might affect their sovereignties is usually solved through the diplomatic channels, that is, extraditing the accused or reaching a compromise with respect to his or her prosecution. It is evermore the idea of exclusive international intervention that causes States the greatest fear.

52. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., Annex, 3417th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

disturbing situation in that country.⁵³ Article 9 of the ICTY Statute⁵⁴ and article 8⁵⁵ of the ICTR Statute, prescribed the relationship between the Tribunals and national courts. The establishment of the Tribunals was based on the principle of concurrent jurisdiction. However, since both tribunals have a special mission, that of contributing to the restoration and maintenance of peace in the Former Yugoslavia and Rwanda, they need more than simple concurrent jurisdiction. Hence, the statutes grant them primacy over the jurisdiction of national courts. At any stage of the procedure, the International Tribunals may formally request the national courts to defer to their competence.⁵⁶ "This extra ordinary jurisdictional priority is justified by the compelling international humanitarian inter-

53. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

54. ICTY Statute, *supra* note 52, art. 9. Article 9 stipulates:

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

55. ICTR Statute, *supra* note 53, art. 8. Article 8 stipulates:

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

56. ICTY Statute, *supra* note 52, art. 9(2); ICTR Statute, *supra* note 53, art. 8(2); *see also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., ¶¶ 64–5, U.N. Doc. S/25704 (1993) [hereinafter *Secretary-General's Report on the Former Yugoslavia*]. In this respect the Secretary-General emphasized that it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to the acts committed. For a further discussion about concurrent jurisdiction, see M. CHERIF BASSIOUNI, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 306–20 (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, *1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 121–36 (1995) [hereinafter MORRIS & SCHARF, *AN INSIDER'S GUIDE TO THE ICTY*, VOL. 1].

ests involved”⁵⁷ and by the Security Council’s determination that both situations constituted a threat to international peace and security.⁵⁸

However, the notion and practice of primacy proved problematic in both the ICTY and ICTR experiences. As mentioned previously, States usually opposed any attempt that might encroach upon their national sovereignty. It was argued that the establishment of the ad hoc tribunals with primacy over national courts constitutes an infringement of national sovereignty.⁵⁹ The ICTY Appeals Chamber held in the *Tadic* case that such infringement was fully justified on the basis of the U.N. Charter, which sometimes restricts national sovereignty in favor of a U.N. Security Council mandate.⁶⁰

Despite the fact that States are fully aware that they are under a duty imposed by the Charter to defer to the competence of the ad hoc tribunals, and to accept their primacy over national courts, the inherent idea of sovereignty still influenced some when they interpreted the concept of primacy. Immediately after the adoption of Resolution 827 (1993) establishing the ICTY, four permanent members of the Security Council, made statements that reflected their opposition to the ICTY’s primacy.⁶¹ These statements limit the scope of the Tribunal,⁶² and reflect both the

57. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 394–95 (1998).

58. *Id.*

59. Goran K. Sluiter, *Co-operation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 681, 710 (Horst Fischer et al eds., 2001).

60. See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Prosecutor v. Tadic), Case No. IT-94-I-AR72, ¶¶ 55–60 (Appeals Chamber, Oct. 2, 1995) 35 I.L.M. 32, 50–52 [hereinafter Appeals Decision on Jurisdiction]; see also U.N. CHARTER art 2, para.7. The U.N. Charter stipulates:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any [S]tate or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id. Such wording demonstrates that provisions taken by the Security Council acting under Chapter VII are the only exception for denial to State sovereignty. For commentary on article 2(7), see Felix Ermacora, *Article 2(7)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 139–54 (Bruno Simma et al. eds., 1995). See also CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 60–72 (Leland M. Goodrich et al. eds., 3d ed. 1969).

61. U.N. SCOR, 48th Sess., 3217th mtg., at 11, 16, 18–19, 46, U.N. Doc. S/PV.1360 (1993) [hereinafter Security Council Statements Against ICTY Primacy].

62. However, the judges of the ICTY have endorsed a much stronger view of primacy, stating “[w]hen an International Tribunal such as the present one is created, it must be endowed with primacy over national courts.” Appeals Decision on Jurisdiction, *supra* note 60, ¶ 58.

dissatisfaction with the scope of primacy and States' preference for the compromise of the complementarity regime. Mr. Merimée, of France, declared: "[W]e believe that, pursuant to Article 9, paragraph 2, the Tribunal may intervene at any stage of the procedure and assert its primacy, including from the stage of investigation where appropriate, in the situations covered under Article 10, paragraph 2."⁶³ Meanwhile, Sir David Hannay of the United Kingdom,⁶⁴ and Madeleine Albright of the United States⁶⁵ mainly held the same view. "These statements are significant, because if key members of the Security Council cannot fully accept of [sic] the ICTY's primacy, then other States will be reluctant to do so as well."⁶⁶

63. Security Council Statements Against ICTY Primacy, *supra* note 61, at 16; *see also* Brown, *supra* note 57, at 398. Article 10(2) of the ICTY Statute stipulates:

A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterized as an ordinary crime; or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

ICTY Statute, *supra* note 52, art. 10(2).

64. Sir David Hannay said:

Articles 9 and 10 of the Statute deal with the relationship between the International Tribunal and national courts. In our view, *the primacy of the Tribunal*, referred to in Article 9, paragraph 2, *relates primarily to the courts in the territory* of former Yugoslavia: elsewhere it will only be in the kinds of exceptional circumstances outlined in Article 10, paragraph 2, *that primacy should be applicable*.

Security Council Statements Against ICTY Primacy, *supra* note 61, at 18 (emphasis added).

65. *Id.*; Ms. Albright said, "it is understood that the *primacy* of the International Tribunal referred to in paragraph 2 of Article 9 *only refers to the situation described* in Article 10." *Id.* (emphasis added). The statement made by Mr. Vorontsov, the Russian Federation's delegate is also relevant:

As we understand it, the provisions of Article 9, paragraph 2, denote the duty of a State to give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court. But this is not a duty automatically to refer the proceedings to the Tribunal on such a matter. A refusal to refer the case naturally has to be justified. We take it that this provision will be reflected in the rules of procedure and the rules of evidence of the Tribunal.

Id. (emphasis added).

66. Brown, *supra* note 57, at 399. Although article 25 of the U.N. Charter obligates the members of the U.N. to accept and carry out the decisions of the Security Council when made in accordance with the Charter, nowhere does the Charter address the issue of whether statements by Members of the Security Council made subsequent to the adoption of a binding decision can alter the scope of the obligations created by the clear terms of that decision. Regardless of the legal effect of these statements, they have practical and political significance. *See* Bartram S. Brown, *The International Criminal Tribunal for the Former Yugoslavia*, in *INTERNATIONAL CRIMINAL LAW: ENFORCEMENT*, *supra* note 6, at 489, 508-09.

From an examination of these statements, one might conclude the Member States intended to restrict the practice of primacy over national courts to the two situations laid down under article 10(2). These situations reflect the scheme proposed by the International Law Commission (ILC) in its draft statute for an international criminal court. In the preamble to the draft, the ILC stated that an international criminal court "is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective"⁶⁷ Furthermore, article 17(2)(a) and (c) of the ICC Statute⁶⁸ mirrors the situations mentioned in article 10(2) of the ICTY Statute. This shows that States intended the more lenient regime of complementarity, which would not be triggered until, *inter alia* the aforementioned requirements are met. While the ICTY Statute states that it has primacy over national jurisdictions, it appears from the restrictions of primacy to situations where the aforementioned requirements were met, that States intended the more lenient regime of complementarity.⁶⁹

On the other hand, the ICTR Statute grants it "primacy over all States." This is stronger language than the more ambiguously stated "primacy over national courts" language in the ICTY Statute. Professor Brown argues that this change indicates that a stronger consensus on primacy developed within the Security Council after the initial reactions against it.⁷⁰ This might be true. However, it seems likely that the stronger language reflected a one-time response to the particular crisis that existed in Rwanda at the time and not a consensus on primacy. Statements made by France,⁷¹ Argentina,⁷²

67. 1994 ILC Draft Statute, *supra* note 35, at 44.

68. ICC Statute, *supra* note 1, art. 17(2).

69. Although the ICTY and ICTR statutes do not deny the right of national courts to exercise jurisdiction according to the principle of concurrent jurisdiction, the prevailing idea of primacy caused concern for some States. Rule 9(iii) mirrors primacy in practice, especially beyond those situations mentioned under article 10(2) of the ICTY Statute and article 9(2) of the ICTR Statute; Rules 9 through 13 of both tribunals generally secure the Tribunal's primacy over national courts when those courts fail to effectively prosecute violations of international criminal law. They also provide the enforcement mechanisms necessary for the Tribunal to exercise its jurisdiction.

70. Brown, *supra* note 57, at 402.

71. Mr. Merimée (France) stated:

In conclusion, I hope that the judgment of such cases in the future will fall within the competence of a permanent international criminal court established by treaty. . . . In our view, it is only because such a court does not exist that the Security Council has had to make use of its powers to establish a first and then a second ad hoc international tribunal. This initiative on the part of the organ entrusted with the maintenance of peace was legitimate and indispensable.

VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 300 (1998) [hereinafter MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, VOL. 2].

72. *Id.* at 303. Ms. Canas (Argentina) stated:

China,⁷³ Brazil,⁷⁴ Spain⁷⁵, Nigeria,⁷⁶ and Rwanda⁷⁷ before voting on the draft resolution establishing the Tribunal confirm that the Security

The establishment of this ad hoc Tribunal by the Council responds to the specific circumstances being confronted by Rwanda, and it is the result of a specific request made by the Rwandese Government for rapid and effective action in this direction to contribute to reconciliation and reconstruction and to the maintenance of peace in Rwanda.

It is clear that, this Tribunal having been set up as an ad hoc organ, it is not authorized to establish rules of international law or to legislate as regards such law but, rather, it is to apply existing international law.

I should like to point out that for my Government, a standing international tribunal, in order to be established as legitimate and effective, should be the result of a treaty agreed among sovereign [S]tates.

Id.

73. *Id.* at 305. China expressed the following views concerning the establishment of the Rwanda Tribunal: "The establishment of an international tribunal . . . is a special measure taken by the international community to handle certain special problems. It is only a supplement to domestic criminal jurisdiction and the current exercise of universal jurisdiction over certain international crimes." *Id.*; see also MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, VOL. 2, *supra* note 71, at 309–10.

74. MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, VOL. 2, *supra* note 71, at 304. Mr. Sardenberg (Brazil) stated:

We voted in favour of the creation of the Tribunal on the Former Yugoslavia because of the exceptionally serious circumstances of the situation . . . I wish to stress that our vote on the establishment of the International Tribunal for Rwanda should not be construed as an overall endorsement of the procedural or substantive elements involved. To our mind, neither of these instances establishes any legal precedent for the future. It is only in the light of the exceptional and extremely serious circumstances, and of the urgency required by the situation in Rwanda, that we agreed to proceed with the establishment of the International Tribunal.

Id.

75. *Id.* at 305–06. Mr. Yanez-Barnuevo (Spain) stated:

The international community could not remain indifferent in the face of those deeds. It is not only the Rwandese people that is affected by such grave violations of human rights and the fundamental values of mankind, but the entire international community. This is why, for the second time in its history, the Security Council, acting under Chapter VII of the Charter, has established a jurisdictional organ with a specific competence but also with broad powers to hand down judgments in these very serious cases. . . . The decision taken today with the adoption of [R]esolution 955 (1994) is within the authority conferred by the Charter of the United Nations upon the Security Council to act in cases of threats to peace. None the less, the establishment of this institution—as in the case of the earlier institution relating to the former Yugoslavia—should in no way cut off the international community's access to the path towards the establishment of a universal criminal jurisdiction. Case-by-[c]ase solutions may be adequate for reasons of urgency, but a general institution would provide a better solution to specific problems Spain therefore resolutely supports the work currently being done by the General Assembly, on the basis of a draft statute prepared by the International Law Commission, with a view to the establishment of a permanent international criminal court with general jurisdiction.

Id.

76. *Id.* at 306. Mr. Gambari (Nigeria) stated, "[i]t is our understanding that the International Tribunal for Rwanda is designed not to replace, but to complement, the sovereignty of Rwanda." *Id.*

77. MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, VOL. 2, *supra* note 71, at 309. Despite the fact that the Security Council had recognized that the national judicial system of Rwanda was incapable of undertaking this immense task—that is, to handle a large number

Council adopted the stronger language due to pressure by the particular crisis, and not because a general consensus on primacy existed among the Members. The debate surrounding the ICTR reflects that it will still be difficult, if not impossible, to reach a consensus for establishing a permanent international tribunal based purely on the notion of primacy.

There were two types of State opposition to an international tribunal based on the concept of primacy. First, the statements made by France, Argentina, Brazil, and China imply that such a tribunal empowered with primacy must be only temporary, and is only acceptable due to the stressing need of the situation. Second, the implications of statements made by Spain, China, Rwanda, and Nigeria are self-evident and suggest their preference for adopting the principle of complementarity rather than primacy, especially when it comes to establishing a permanent international tribunal.

Furthermore, problems with the practical enforcement of primacy by these ad hoc tribunals make it clear that primacy is not a viable option for the ICC.⁷⁸ The primacy of the ICTY and the ICTR does not have immediate self-application.⁷⁹ This primacy is not automatic; in fact it is

of cases in addition to those handled by the Rwanda Tribunal—Rwanda requested the establishment of an international tribunal to supplement rather than to supersede the jurisdiction of its national courts.

78. Brown, *supra* note 57, at 426. Regarding the ICTY, the fact that four of the five permanent members of the Security Council made qualifying statements on article 9 shows that primacy has great practical and political significance. It was concluded from these statements, that when the ICTY Statute was adopted, the key powers in the Council did not endorse the full extent of the tribunal's primacy over national courts. This may indicate the response of the Security Council if it is asked to enforce a request for deferral which falls within the scope of article 9, but not within the scope of these qualifying statements. The ICTY Prosecutors have based all their requests for deferral upon on rule 9(iii), which sets out precisely the primacy aspect of article 9, which does not fall within the two enumerated circumstances of article 10(2) of the ICTY Statute. Since four members of the Security Council possessing veto power have said that they do not believe that primacy extends so far, it is reasonable to assume that, unless they have a change of heart, the Security Council is unlikely to enforce the ICTY's requests that this broader primacy be enforced. Accordingly, no binding decisions against any failure of States to cooperate with the Tribunal would be made. This has created a deplorable gap between the theoretically binding nature of the Tribunal's primacy and the *de facto* limitation of that primacy to cases of voluntary State cooperation. This lack of political support leaves the Tribunal unable to enforce even this most basic aspect of its jurisdiction.

79. Benvenuti, *supra* note 16, at 34. The ad hoc tribunals have no coercive means in order to directly implement their primary jurisdiction. This results from the lack of supranational character in these tribunals (at least within the narrow meaning of the European Court of Justice) and from the inter-State character of the rules governing them. However, the ad hoc tribunals can react as provided by rules 11 and 61 of their Rules of Procedure and Evidence, which refer to the Security Council the duty to enforce the tribunals' primacy as a result of a State's failure to cooperate with the tribunals. The question of whether the Security Council should react is a political issue. See *supra* text accompanying note 78.

only mandatory and not directly applicable.⁸⁰ Thus, States must enforce the principle of primacy and take the measures necessary under domestic law when an international court formally requests national courts to defer a case.⁸¹ However, some domestic laws, by providing for the possibility that a national judge can challenge the jurisdiction of the international tribunal, refuse to recognize the direct primacy of the tribunal. All of these laws, therefore, conflict with the principle of *kompetenz-kompetenz* (jurisdiction of an international tribunal to determine its own jurisdiction), universally recognized at the international level.⁸²

Although the *Tadic* decision⁸³ reinforces the primacy of the ad hoc tribunals, the *Ntakirutimana* case, for example, exposes their weakness to enforce such a mechanism.⁸⁴ The public statements of the Texas Mag-

80. Flavia Lattanzi, *The Complementarity Character of the Jurisdiction of the Court with Respect to National Jurisdictions*, in *THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE* 1, 3 (Flavia Lattanzi ed., 1998). Cassese has observed:

[T]he ICTY remains very much like a giant without arms and legs, it needs artificial limbs to walk and work. And these artificial limbs are [S]tate authorities. If the co-operation of [S]tates is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force [S]tates to cooperate with it.

Benvenuti, *supra* note 16, at 37 n.34.

81. Benvenuti, *supra* note 16, at 35.

82. *Id.*; see also Lattanzi, *supra* note 80, at 4. For example, article 3 of the Italian Law provides for the transfer of the criminal proceedings at the request of the International Tribunal, but only if the following conditions are satisfied: a) the International Tribunal proceeds with respect to the same facts as the Italian Judge; and b) the fact must fall within the territorial and temporal jurisdiction of the International Tribunal, in accordance with article 8 of the Statute. Article 4 of the French Law used to provide similar provisions. The Bosnian, Danish and Swedish implementing laws, on the other hand, are fully in line with the obligation to defer to the ad hoc tribunal. They do not provide for any procedure to verify particular conditions. For a detailed discussion of the principle of *kompetenz-kompetenz*, see Appeals Decision on Jurisdiction, *supra* note 60, ¶¶ 17–20.

83. The ICTY in the *Tadic* case concentrates on the results of the attitude of States willing to render effective the primacy of the International Tribunal. See Appeals Decision on Jurisdiction, *supra* note 60.

84. Despite the outcomes of the two cases appearing before the Tribunals (ICTY and ICTR), both Tribunals were empowered with the same notion of primacy. See *In the Matter of Surrender of Elizaphan Ntakirutimana*, 1997 U.S. Dist. LEXIS, 20714, at *6–20 (S.D. Tex. Dec. 17, 1997). Notwithstanding the existence of the two agreements on surrender of persons between the government of the United States and the ICTY (signed on October 5, 1994) and the government of the United States and the ICTR (signed on January 24, 1995), the United States District Court for the Southern District of Texas, Laredo Division, denied the request of the ICTR to surrender the accused person on the grounds that the agreement with the ICTR was unconstitutional and, therefore, inapplicable. Moreover, the Court deemed that evidence enclosed with the request for surrender by the ICTR “does not rise to the level of probable cause.” However, this decision was reversed on August 5, 1998 by a Federal Judge who ordered the deportation of Elizaphan Ntakirutimana to the ICTR. This decision was subject to appeal.

In August 1999, the U.S. Court of Appeals for the Fifth Circuit upheld the U.S. District Judge’s ruling to order the surrender of Ntakirutimana to ICTR. Ntakirutimana appealed the decision before the U.S. Supreme Court and on January 24, 2000, the Court refused a request

istrate, as well as his initial ruling, indicate how the primacy of international tribunals can be perceived as a threat to State sovereignty.⁸⁵ Since States often resist any attempt to subordinate their national sovereignty, their refusal to cooperate with the international tribunals to enforce the tribunal's primacy is a predictable result.

In conclusion, the appropriate relationship between national and international jurisdiction depends upon a delicate balance of national sovereignty interests and international community interests. Specific threats to international peace and security in the former Yugoslavia and Rwanda gave rise to international tribunals endowed with primacy over national courts. Now, however, as States contemplate a permanent ICC, they must strike a more general balance between the traditional State preference for national jurisdiction over crimes, and the need to ensure that fundamental norms of international humanitarian law will be universally enforced. It would have been impossible to create an effective ICC unless even those States with the most fair and credible legal systems were willing to accept some compromise in their national criminal jurisdiction, that is, to relinquish part of their sovereign rights. Humanitarian interests and the fundamental need to maintain international peace and security justify such a compromise. Here, such balance is reflected through the mechanism (complementarity) of the new permanent institution, the ICC. The principle of complementarity, which is considered the cornerstone for the future ICC. Part II will shed light on the practical role of complementarity through the ICC Statute and its impact on the provisions of that statute.

to review the Fifth Circuit ruling, clearing the way for U.S. officials to hand over Ntakirutimana to the ICTR.

It might be argued that the subsequent deferral of the United States to the competence of the international tribunal demonstrates its willingness and acceptance of the primacy of the tribunals, thus opposing its earlier statement made subsequent to the Security Council's Resolution for establishing the ICTY. However, it might be argued that the reverse of such a decision in itself does not reflect the approval of the United States of the exclusive notion of primacy. Due to political considerations, the decision of the current case was an embarrassment for the U.S. government, which had taken a high profile stance in publicly encouraging other States to cooperate with the Tribunals.

85. As Magistrate Judge Notzen explained:

I question whether we are acting here to subordinate U.S. sovereignty to the United Nations. I am particularly bothered by the potential harm of depriving this man of his freedom. . . . Little by little, we are losing the guarantees of those individual freedoms each time we give up a bit of our freedoms. It makes me, as the grandfather of five little girls, worry about their future.

U.S. Magistrate Marcel Notzen of Laredo, *quoted in* William Norman Grigg, *The Long Arm of UN Law*, July 20, 1998, at http://www.thenewamerican.com/tna/1998/vol14no15/vol14no15_un_law.htm (last visited Aug. 1, 2001).

II. THE ICC AND THE PRINCIPLE OF COMPLEMENTARITY

A fundamental problem facing the drafters of the Statute of the ICC was the role the institution would play in relation to national courts. The common view was that the ICC should complement national jurisdictions. Defining the precise nature of such a relationship was both politically sensitive and legally complex.⁸⁶ Some delegations to the drafting of the ICC, while supporting the establishment of an ICC, were unwilling to create a body that could impinge on national sovereignty.⁸⁷ A number of delegations stressed that the principle of complementarity should create a strong presumption in favor of national jurisdiction. Such presumption, they said, was justified by the advantages of national judicial systems.⁸⁸

The view was also expressed that in dealing with the principle of complementarity a balanced approach was necessary. It was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction.⁸⁹ The drafters recognized that the issue of complementarity and the relationship between the ICC and national courts would have to be examined in a number of other interconnected areas, for example, in regard to international judicial cooperation, and issues involving surrender, among others. Thus, the main trend was to achieve consensus on this relationship, since States were reluctant to agree to a compromise on any fundamental issue without having a clear sense of how the final, complete picture would appear. Once the legal relationship between the Court and States could be established, it would be easier to make progress on other major issues.⁹⁰

86. John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 41, 41 (Roy S. Lee ed., 1999).

87. For thorough discussions on the drafting history of the principle of complementarity see, for example, 1994 ILC Draft Statute, *supra* note 35; *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, ¶¶ 29–51, U.N. Doc. A/50/22 (1995) [hereinafter *1995 Ad Hoc Committee Report*]; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Vol. 1, Supp. No. 22, ¶¶ 153–78, U.N. Doc. A/51/22 (1996) [hereinafter *1996 PrepCom Report, Vol. 1*]; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 51st Sess., Vol. 2, Supp. No. 22, U.N. Doc. A/51/22 (1996) [hereinafter *1996 PrepCom Report, Vol. 2*].

88. *1995 Ad Hoc Committee Report*, *supra* note 87, ¶ 31.

89. *Id.* ¶ 34.

90. Holmes, *supra* note 86, at 43.

*A. The 1994 ILC Draft and Its Role in the Development
of the Concept of Complementarity.*

The first attempt to study such a relationship was taken by the ILC, which placed the principle of complementarity in the third paragraph of the preamble of its Draft Statute.⁹¹ The principle is repeated, again in general terms, in article 1 of the Draft.⁹² The 1994 ILC Draft Statute has been the cornerstone for the construction of the notion of complementarity, specifically those practical aspects built into the current ICC Statute.⁹³

In the Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee), one of the main questions was whether the principle of complementarity should be reflected in the preamble or embodied in an article of the 1994 Draft Statute. Two views were expressed. According to one view, considering the importance of the matter, a mere reference in the preamble was insufficient, and a definition, or at least a mention, of the principle should appear in an article of the Statute, preferably in its opening part. Such a provision would remove any doubt as to the importance of the principle of complementarity in the application and interpretation of subsequent articles.⁹⁴

According to the other view, the principle could be elaborated in the preamble:

[R]eference was made in this context to [a]rticle 31 of the Vienna Convention on the Law of Treaties, according to which the preamble to a treaty was considered part of the context within which a treaty should be interpreted, and the remark was made that a statement on complementarity in the preamble to the Statute would form part of the context in which the Statute as a whole was to be interpreted and applied.⁹⁵

Several delegations felt that an abstract definition of the principle would serve no useful purpose and found it preferable to have a common

91. 1994 ILC Draft Statute, *supra* note 35, pmbl. ¶ 3 (“emphasising further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective”).

92. *Id.* at 43 (stating “[t]here is established an International Criminal Court, which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions . . .”).

93. The drafters relied on the 1994 ILC Draft Statute as the main framework to interpret and develop the idea of complementarity.

94. 1995 *Ad Hoc Committee Report*, *supra* note 87, ¶¶ 35–36.

95. *Id.* ¶ 37; see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. Article 31 stipulates: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose . . .” *Id.*

understanding of the practical implications of the principle for the operation of the ICC.⁹⁶

The Ad Hoc Committee also debated how far ICC jurisdiction should extend in regard to national jurisdiction. It recognized that unlike the jurisdiction of the two ad hoc tribunals, which is provided and exercised independently of the unavailability or effectiveness of local authorities to prosecute the suspected criminals, the jurisdiction of the ICC is intended only for those cases where national procedures are unavailable or ineffective.⁹⁷

The inclusion in the 1994 Draft Statute preamble of "or may be ineffective" made it clear that the ILC believed that the Court's jurisdiction should extend beyond those situations where the national jurisdiction was simply not functioning. The ILC Draft was silent with respect to unavailability, presumably satisfied that the Court could exercise jurisdiction if the national system failed to proceed.⁹⁸ This was the underlying premise of article 35 of the ILC Draft Statute, which addressed the question of admissibility, and the concept of complementarity. This article provided the criteria for determining when a case is admissible or inadmissible by the Court.⁹⁹ It is this criterion which formed the basis of the current ICC provision on admissibility.¹⁰⁰ There was a wide measure of agreement that the words "available" and "ineffective" were unclear. Questions were raised as to the standards that would determine whether a particular national judicial system was "ineffective."¹⁰¹ Consequently, the Ad Hoc Committee made the observation that the commentary to the

96. *Id.* ¶ 30.

97. Lattanzi, *supra* note 80, at 9.

98. Holmes, *supra* note 86, at 44.

99. See 1994 ILC Draft Statute, *supra* note 35, at 105. Article 35 reflects the notion of complementarity by stating,

[t]he Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this statute set out in the Preamble, that a case before it is inadmissible on the ground that the crime in question:

- a) has been duly investigated by a State with Jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
- b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
- c) is not of such gravity to justify further action by the Court.

Id.

100. The drafters developed their work on article 35 of the ILC Draft Statute by submitting proposals during the meetings until they reached the final version of article 17 of the current statute.

101. 1995 Ad Hoc Committee Report, *supra* note 87, ¶ 41.

preamble clearly envisaged a very high threshold for exceptions to national jurisdiction and that the ILC only expected the ICC to operate in cases in which there was no prospect that the alleged perpetrators of serious crimes would be duly tried in national courts.¹⁰² In 1996, the Ad Hoc Committee was replaced by a Preparatory Committee (PrepCom). In this respect, the 1996 PrepCom adopted an identical approach.¹⁰³ The unclear definitions of “unavailability or ineffectiveness” of national judicial systems were criticized during the 1996 session of the PrepCom.

There were other criticisms regarding the admissibility provisions. Some States believed that the terms used by the ILC in the preamble’s third paragraph were too vague while others found them too intrusive.¹⁰⁴ It was noted that the principle of complementarity involved, besides the third paragraph of the preamble, a number of other articles, and article 35 on admissibility, was central among them. States criticized the formulation of article 35 because the grounds indicated in that article, on the basis of which the Court decides whether the case before it is admissible, were too narrow. They covered only those cases being investigated, and did not cover the cases that had been or were being prosecuted at the time. Past or ongoing legal proceedings should be subject to qualifications of impartiality, diligent prosecution, and so on. Moreover, it was observed that grounds for inadmissibility scattered in other articles of the Statute—for example, article 42, *ne bis in idem*—could be included in article 35, making it the main article on complementarity in the operative part of the Statute.¹⁰⁵

Other delegations pointed out the difficulties of assessing ineffective procedures and faulted the subjective character of the proposed criteria. They felt that more stringent and objective criteria, possibly to be included in the text, would be needed for the purposes of greater clarity and security. The efficiency of national proceedings, as juxtaposed with the intention to shield the accused would be such a criterion. Several delegations noted that notions such as “absence of good faith” and “unconscionable delay” in the conduct of national proceedings would be useful tools for the clarification of this issue. Other delegations felt that these terms were vague and possibly confusing.¹⁰⁶ This realization became the first step in adding new criteria in order to achieve a clearer and more objective standard.¹⁰⁷

102. *Id.* ¶ 42.

103. 1996 PrepCom Report, Vol. 1, *supra* note 87, ¶ 154.

104. Holmes, *supra* note 86, at 45.

105. 1996 PrepCom Report, Vol. 1, *supra* note 87, ¶ 164.

106. *Id.* ¶ 166.

107. 1996 PrepCom Report, Vol. 2, *supra* note 87, at 3. See, for example the new proposal to the Preamble of the ILC Draft: “Emphasizing further that the international criminal

At the commencement of the PrepCom's August 1997 session, the Chairman of the Committee asked the head of the Canadian delegation, Mr. John Holmes, to coordinate informal consultations on the issue.¹⁰⁸ Subsequently, the coordinator produced a draft article on complementarity, which was later approved by the Committee at the end of the August session.¹⁰⁹ Later, several more provisions were added to the draft article to achieve consensus. First, a text box was placed at the beginning of the draft article to explain its origins.¹¹⁰ Second, a number of footnotes were added to explain the approach taken. Many of these notes referred to the fact that the final version of the draft article would depend on the outcome of discussions on other issues in the Statute.¹¹¹ Third, the terms "unwilling" or "unable genuinely," were mentioned for the first time in the draft of article 35.¹¹² In addition, the criteria to determine "unwillingness," including sham trials, and "inability" was also addressed in this article.¹¹³

court shall complement national criminal justice systems when they are unable or unwilling to fulfill their obligations to bring to trial such persons." *Id.* at 2. Here, for the first time, the terms "unable" and "unwilling" emerged.

108. See *Decisions Taken by the Preparatory Committee at Its Session Held 4 to 15 August 1997*, U.N. GAOR, 52nd mtg., U.N. Doc. A/AC.249/1997/L.8/Rev.1 (1997) [hereinafter *1997 PrepCom Decisions*]. The PrepCom did not discuss the issue of complementarity again until the August 1997 session.

109. Holmes, *supra* note 86, at 45–6.

110. *1997 PrepCom Decisions*, *supra* note 108, at 10. The text box reads:

The following draft text represents the results of informal consultations on article 35 and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

Id.

111. See *1997 PrepCom Decisions*, *supra* note 108, at 11–12; see also Holmes, *supra* note 86, at 46.

112. *1997 PrepCom Decisions*, *supra* note 108, at 10–11. Article 35(2) of the Draft reads:

Having regard to paragraph 3 of the Preamble, the Court shall determine that a case is inadmissible where:

- a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

Id. art. 35(2).

113. *Id.* Article 35(3) states:

In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

Finally, the delegates considered an alternative approach to the one put forward.¹¹⁴

This progress continued and similar draft articles emerged during the Inter-Sessional Meeting in Zutphen¹¹⁵ and in the Draft Final Act.¹¹⁶ Until the latter stage, most delegations accepted the view that the compromise on complementarity had been achieved and the text box and the alternative approach would disappear over time.¹¹⁷ Despite this progress, some delegates were still concerned about the definitions of “inability” and “unwillingness” and some of the technical issues related to the complementarity provisions. The negotiations on these issues continued even in the Rome Conference.¹¹⁸ Nevertheless, the Statute, which included the

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- a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 20;
 - b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Id. art. 35(3). Article 35(4) states:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Id. art. 35(4).

114. 1997 *PrepCom Decisions*, *supra* note 108, at 12. The text reads as follows:

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows: The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.

Id.

115. See *U.N. Preparatory Committee on the Establishment of an International Criminal Court, Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands*, art. 11, at 41–43, U.N. Doc. A/AC.249/1998/L.13 (1998) [hereinafter *Report of the Inter-Sessional Meeting in Zutphen*].

116. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, art. 15, U.N. Doc. A/Conf.183/2/Add.1 (1998) [hereinafter 1998 Draft Final Act].

117. Holmes, *supra* note 86, at 48.

118. See Sharon A. Williams, *Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE: OBSERVERS' NOTES, ARTICLE BY ARTICLE, *supra* note 25, at 390. In essence article 17 could not be opened up for substantial change or the package based on compromise would have folded. This was made clear in the general debate in the Committee of the Whole by the coordinator. Not all States were completely satisfied, but saw the article as a delicately balanced compromise. However, some delegations including China, Egypt, Mexico, Indonesia,

provisions on complementarity, was adopted as a package, to be either accepted or rejected in its entirety.

B. Complementarity & Article 1 of the ICC Statute

The following Section will highlight the concerns and compromises of the delegates regarding complementarity by examining the complementarity provisions found in the current ICC Statute. To attain the goal of international justice, article 1 of the ICC Statute states in simple language that the Court will "be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdictions." The ICC Statute does not define the term "complementarity" anywhere. However the plain texts of paragraph 10 of the preamble¹¹⁹ and of article 1 compel the conclusion that the ICC is intended to supplement the domestic punishment of international violations, rather than supplant domestic enforcement of international norms. Indeed, the obligation of States to use their domestic fora to punish violators of international law was not the outcome of recent treaties,¹²⁰ but has roots that run back to the ideas of Hugo Grotius.¹²¹ The Complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crimes. It balances that supranational power against the

India, and Uruguay wanted to reopen the negotiations. Thus, the intention of the coordinator who had continued with his role at the request of the Bureau of the Committee of the Whole in Rome was to "resist holding informal consultations for as long as possible" for two reasons. First, this would have led to unending consultations and proposals, and accordingly impede adopting a strengthened complementarity article. Second, the coordinator was of the view that bilateral contacts with delegations would afford him a better opportunity for gauging concerns of States opposed to the Draft Statute's text. Three main problems with the text surfaced as indicated by the coordinator. These problems concerned the terms "unwillingness," "undue delay," and "inability" or "partial collapse." For a discussion on these issues, see *infra* Section II.C.

119. This text reads, "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." ICC Statute, *supra* note 1, pmbl. ¶ 10.

120. See, e.g., *supra* notes 28, 44, and 49 (listing the international instruments that impose this duty upon States and the priority to suppress those crimes under their provisions); see also ICC Statute, *supra* note 1, pmbl. ¶ 6 ("[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"). In this respect, the International Court of Justice (ICJ) deemed the obligation "to respect and to ensure respect," which in fact reflects the duty upon States to suppress crimes under International Humanitarian Law (IHL), an obligation of general international law. *Military and Paramilitary Activities (Nicar. V. U.S.)*, 1986 I.C.J. 14 (June 27).

121. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 26 (2001).

sovereign right of States to prosecute their own nationals without external interference.

The reference to the principle of complementarity in both the preamble and article 1 seem duplicative. This was done to satisfy most of the desires of the States. The ILC Draft Statute, as seen, had included a provision in the preamble on complementarity. Article 15 of the draft statute submitted by the PrepCom also included a reference to the preamble, and a suggestion for further clarification of complementarity.¹²² Moreover, at the Conference, the delegation of Andorra began informal discussions on the preamble. These discussions seemed to indicate that a paragraph might be needed in the preamble to elaborate the principle of complementarity as was done in the ILC Draft Statute. However, since the principle itself was already elaborated in article 17, delegations decided that it was no longer necessary to include further elaboration in the preamble and that the basic principle would be adequate. Meanwhile, members of the Drafting Committee working on part 1 of the Statute, suggested that a reference to the principle of complementarity should also be added in part 1, in addition to the reference considered for inclusion in the preamble. They believed that the principle was so fundamental that it should be restated in article 1 on the establishment of the Court. Consequently, this led to a minor change to article 17, resulting in an additional reference to the preamble and to article 1, which was quickly acceded to by delegations.¹²³

From an analytical examination of the drafting history, one might suggest that this duplication does not spring from any legal necessity; rather it was the result of fear that such an international jurisdiction might supplant States' sovereignty.¹²⁴

C. Complementarity and Issues of Admissibility

Under the rubric of "admissibility" in article 17, the ICC Statute reflects the balance and the complex relationship between national legal systems and the ICC.¹²⁵ In order to implement the complementarity

122. See 1998 Draft Final Act, *supra* note 116, at 40 n.15. A footnote was placed as follows, "[s]uggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute."

123. See Williams, *supra* note 118, at 391; see also Holmes, *supra* note 86, at 55–56.

124. Vienna Convention, *supra* note 95, art. 31. The reference to the principle of complementarity in the preamble is sufficient to reflect the very essence of complementarity, since the preamble to a treaty was considered part of the context within which a treaty should be interpreted, and a statement on complementarity in the preamble to the ICC Statute would form part of the context in which the Statute as a whole was to be interpreted and applied; see also 1995 *Ad Hoc Committee*, *supra* note 87, ¶¶ 35–36 (adopting a similar principle).

125. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66–67 (2001).

principle, the ICC Prosecutor and judicial chambers must respect and adhere to the Statute's admissibility criteria. Article 17 represents the most direct mechanism for allocating responsibility for a prosecution between the ICC and one or more domestic sovereigns that may have jurisdictional authority. If, according to the criteria listed in article 17, a case is determined to be "inadmissible," the ICC Statute blocks the authority of the ICC Prosecutor and judicial chambers. These admissibility criteria, therefore, establish the critical bulwark that protects the authority and right of sovereign States to prosecute these cases in their national courts, as opposed to relying on the ICC.¹²⁶

There are four questions that must be answered to determine admissibility. First, is the case being investigated by a State with jurisdiction? Second, has a State investigated and concluded that there is no basis to prosecute? Third, has the person already been tried for this conduct? Finally, is the case of insufficient gravity to proceed? If the answer to any of these questions is in the affirmative, the Court may, *sua sponte*, raise the issue of admissibility. The ICC Prosecutor must, *sua sponte*, raise the issue of admissibility.¹²⁷ These criteria may sound simple, but in practice they will be complicated. The Statute gives both the Prosecutor and the judicial chambers the tools necessary to determine admissibility. These tools are the technical terms embedded in article 17. The finding of "unwillingness or inability of the State genuinely to prosecute" is governed and restricted by these technical terms.¹²⁸ The significance of these terms appears from a literal reading of the text of article 17 itself.¹²⁹

126. Newton, *supra* note 121, at 47–48.

127. *Panel Discussion*, *supra* note 21, at 250. However, this does not mean that the Prosecutor shall rely merely on one of the aforementioned grounds. The appropriate construction of the Statute suggests that the determination of the admissibility of a case should be tested in light of the purpose of article 17 and the statute as a whole. For example, the Prosecutor in his assessment whether a case is or would be admissible, should prove, on the one hand, that the State which is investigating the case is not acting *bona fide*, and on the other hand that the case oversteps the gravity test. This is best exemplified in the wording of article 53(1) of the Statute. This construction matches the spirit and purposes of the Statute, which are also reflected in paragraphs 3 and 4 of its preamble. For the text of article 53(1), see *infra* note 173.

128. ICC Statute, *supra* note 1, art. 17(1)(b).

129. *Id.* Article 17(1) reads:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

The core of the admissibility test is whether a State with jurisdiction has the willingness and ability to investigate and prosecute. If the Court concludes that such a national forum is available, it must show deference to the national jurisdiction that has seized itself of the matter.¹³⁰ According to article 17(1) the Court must decline jurisdiction unless the Prosecutor can show that the State which has seized itself of the matter is “unwilling or unable genuinely” to carry out the investigation or prosecution. The burden of proof rests on the Prosecutor.

The nature of the “unwillingness” and “inability” tests will in many cases demand greater resources of the Prosecutor in preparing the admissibility argument than proving the guilt of the alleged perpetrator.¹³¹ These terms seem to endow both the Prosecutor and the Court with a wide discretion of assessment, and therefore the delegations considered the definition of the terms an indispensable issue.

Defining “unwillingness” became a contentious issue to resolve. The difficulties centered on how subjective or objective the test for determining unwillingness should be. The intention was to eliminate the terms that contained subjective elements.¹³² However, some subjectivity had to be retained to give the Court latitude in its decision on unwillingness. In

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- c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3

Article 17(2) reads:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Article 17(3) reads:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

130. Morten Bergsmo, *The Jurisdictional Regime of the International Criminal Court (Part II, Articles 11–19)*, 6/4 EUR. J. OF CRIME, CRIM. L. AND CRIM. JUST. 29, 43 (1998).

131. *Id.*

132. Holmes, *supra* note 86, at 49.

the end, the drafters compromised by adding the word “genuinely” in order to serve in the determination of the unwillingness. Some delegations argued vigorously in favor of the word “genuinely.” To them, it reflected a more objective connotation than the words “effectively,” or “diligently” which the ILC had used in its draft. Many other delegations argued that “genuinely” was even less clear than the other terms. Nevertheless, the term was adopted as being the “the least objectionable word.”¹³³

It seems that the latter argument was correct; the word genuinely is to a certain extent vague and led to uncertainty. It was argued that this word might create ambiguities. In the opinion of Professor Sadat and Richard Carden, the application of the word poses two controversial questions: Does “genuinely” refer to situations where the State’s motives are not genuine—they are duplicitous or disingenuous—or to situations where the State is really unable or unwilling to prosecute?¹³⁴ An examination of article 17, suggests that “genuinely” refers to situations where the State is really unable or unwilling to proceed. By analyzing the purpose of the words “effectively” and “diligently” used by the ILC and the intention of the drafters regarding the word “genuinely,” one may reach such a conclusion.¹³⁵

Since the test of “unwillingness” as elaborated in article 17(2), is in effect a test of the good faith of national authorities, the Statute provides a set of combined criteria to assure the effectiveness of this test. The first criterion mentioned in article 17(1)(a), requires the Prosecutor or the Court to establish that the proceedings¹³⁶ or the decision were “for the purpose of shielding the person concerned from criminal responsibility.” Given that proving such a purpose may be difficult for the Prosecutor or the Court, it was agreed to add a second criterion: “undue delay.” This phrase emerged and was linked to the intent of the State to bring the accused to justice. However, since this phrase was later criticized in the Committee of the Whole as being too low a threshold, the Committee replaced it in the final draft with “unjustified delay,” the current text of article 17(2)(b).¹³⁷ This change has merit, since the word unjustified “sets

133. *Id.* at 50; see also Williams, *supra* note 118, at 392.

134. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 418 (2000).

135. According to Black’s Law Dictionary, “genuine” means real as opposed to false. BLACK’S LAW DICTIONARY 618 (5th ed. 1979).

136. The term “proceedings” covers both investigations and prosecutions. In this respect, see *Report of the Inter-Sessional Meeting in Zutphen*, *supra* note 115, at 43.

137. *Id.*; Williams, *supra* note 118, at 390–91; see also *Bureau Proposal on Part 2 (Jurisdiction, Admissibility and Applicable Law)*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Comm. of the

a higher standard than [the word] undue, in that it implies the right of States to explain any delay before the Court determines that a case is admissible.”¹³⁸ Otherwise the Court’s finding of “undue delay” could occur without considering the views or rationalizations of the State concerned.¹³⁹

However, this change might leave room for any State which has jurisdiction over a case to act in bad faith and rely on an invented justification. Thus it could decrease the accuracy of the Court’s and the Prosecutor’s assessments regarding the admissibility of a case, especially since such an assessment must take into consideration a critical criterion, the “intent to bring the person concerned to justice.”¹⁴⁰ Having to prove this intent makes the situation even more complex. Either term is very difficult to assess in practice however, and it can be argued that the word “unjustified” increases the objectivity of the assessment. Hence, this would assist both the Prosecutor and the Court to determine in a more objective manner whether the State is acting in bad faith.¹⁴¹

The third criterion to determine unwillingness was the independence and impartiality of the proceedings. If the ICC determines that the proceedings “were not or are not being conducted independently or impartially” but are in fact being conducted in a manner, “which in the circumstances is inconsistent with an intent to bring the person to justice,” the case will be admissible.¹⁴² At first it was proposed that this paragraph should be under the heading of inability. If the State could not provide impartial proceedings and procedural guarantees for the accused person the Court should intervene.¹⁴³ This view was opposed by some delegations that argued that procedural fairness should not be a basis for the purpose of defining complementarity.¹⁴⁴ Even so, in the negotiations it emerged that there could be procedural problems in a State which, while not meeting the test of shielding the accused, could be inconsistent with an intent to bring the accused to justice. For example the State may be genuinely endeavoring to prosecute someone, therefore the intent to shield is not an issue. However, there may be individuals who are trying

Whole, art. 15, U.N. Doc. A/CONF.183/C.1/L.59 (1998) [hereinafter *Bureau Proposal on Part 2*].

138. Holmes, *supra* note 86, at 54.

139. *Id.*; Williams, *supra* note 118, at 391.

140. ICC Statute, *supra* note 1, art. 17(2)(b).

141. This does not mean that the Prosecutor or the Court would not be granted any subjective criterion to their assessment. The idea behind this argument is that the objective criterion would weigh more than the subjective. This reduces the risk of facing arbitrary decisions based merely on subjective assessments.

142. ICC Statute, *supra* note 1, art. 17(2)(c).

143. Williams, *supra* note 118, at 394.

144. Holmes, *supra* note 86, at 50.

to cause a mistrial, or taint evidence and ensure that the accused will not be found guilty.¹⁴⁵ “[T]he added criterion was thus believed to be necessary, even though it may appear to duplicate the two other criteria of shielding or unjustified delay.”¹⁴⁶

Finally the phrase “having regard to the principles of due process recognized by international law,”¹⁴⁷ was agreed to at the final negotiations. The phrase “in accordance with the norms of due process recognized by international law” was the original language, and it was thought that it should be added to the paragraph that dealt with the independence and impartiality of the national proceedings, in order to have more objective criteria.¹⁴⁸ The Bureau, in advancing the negotiations on part 2 of the Statute, included this idea in both its Discussion Paper and its Proposal.¹⁴⁹ As the bilateral negotiations proceeded, several delegations also favored this idea, but indicated their concern that this still left other criteria relating to unwillingness less objective. Accordingly, Mr. Holmes—the coordinator of the complementarity discussions in the PrepCom—developed the current language in the chapeau of the paragraph on unwillingness.¹⁵⁰ It was inserted to inject more objectivity into the criteria for determining unwillingness and to suggest an assessment of the quality of justice from the standpoint of procedural and even substantive fairness.¹⁵¹ However, Lieutenant Colonel Newton argues that since the Statute does not define the aforementioned phrase, the Prosecutor would have a wide margin of discretion to meet the objective admissibility criteria.¹⁵² Thus, this may have a direct effect on the conception of complementarity.

Article 17(3) introduces another criterion for determining the effectiveness of domestic procedures, namely, whether the State is able to carry out its duty. In regard to the concept of inability, paragraph 3 states:

[I]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable

145. Williams, *supra* note 118, at 394.

146. Holmes, *supra* note 86, at 51.

147. ICC Statute, *supra* note 1, art. 17(2).

148. Holmes, *supra* note 86, at 53.

149. See *Bureau Discussion Paper on Part 2 (Jurisdiction, Admissibility and Applicable Law)*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Comm. of the Whole, art. 15, U.N. Doc. A/CONF. 183/C.1/L.53 (1998) [hereinafter *Bureau Discussion Paper on Part 2*]; *Bureau Proposal on Part 2*, *supra* note 137.

150. Williams, *supra* note 118, at 390–91.

151. SCHABAS, *supra* note 125, at 68.

152. Newton, *supra* note 121, at 66.

to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Accordingly, the ICC may assert its jurisdiction only when it identifies a gap in State jurisdictions, a gap created by the lack of repression. This gap may be the consequence of poor administration of justice, or a breakdown of State institutions, such as the national judicial system, or of widespread anarchy.¹⁵³ The State must be unable to obtain an accused or key evidence and testimony, and its inability must relate to the total, substantial collapse,¹⁵⁴ or unavailability of its judicial system.¹⁵⁵ However, combining these two criteria concerned some of the delegations during the preparatory work. They believed that combining the two criteria could limit the Court's ability to act.¹⁵⁶ Thus, to meet these concerns, the phrase "or otherwise unable to carry out its proceedings" was added.¹⁵⁷ These concerns have merit, since the failure of a State to obtain the accused or the necessary evidence and testimony might be attributed to any external reason other than those mentioned in paragraph 3.

Meanwhile, although the terms "total" and "substantial collapse" seem to raise the threshold of the criterion,¹⁵⁸ some practical problems still exist. For example, a developed and functional justice system that is unable to obtain custody of an offender because of a lack of extradition treaties would still be able to defy ICC prosecution on the ground of complementarity.¹⁵⁹ The dilemma is that the term "partial collapse" could function as a double-edged sword. For example, a situation might emerge where a partial collapse might only affect some regions, while the courts in the remaining regions would continue to function.

However, the fact that some other circumstances might cause this partial collapse does not change the fact that the State cannot obtain custody of the accused, which is the heart of inability. The State could not

153. Benvenuti, *supra* note 16, at 44.

154. Holmes, *supra* note 86, at 49.

155. ICC Statute, *supra* note 1, art. 17(3); *see also* SCHABAS, *supra* note 125, at 68; Williams, *supra* note 118, at 394.

156. Holmes, *supra* note 86, at 49. In this respect, some delegations reflected their concern by providing an example, that is, if the accused and some evidence were obtained but other aspects of the national proceedings were affected by the collapse.

157. Some delegates believed that adding this criterion seemed superfluous. *Id.*

158. *Id.* at 55 (emphasis added).

159. SCHABAS, *supra* note 125, at 68. This is because of the deletion of the earlier term "partial" collapse. However, some delegations argued vigorously in favor of its deletion:

[T]hese delegations argued that it was possible to have a partial collapse of a national judicial system and yet that country could still undertake a *bona fide* prosecution. The example was given of a breakdown in one region of a State, while the Courts in the remaining regions continue to function.

Holmes, *supra* note 86, at 55.

obtain the accused because of the partial collapse of its judicial system and thus would be unable to prosecute the case, unless it had the necessary evidence to try the accused *in absentia*. Even though the State would not meet the requirements of inadmissibility, it could block the Court's jurisdiction over this case. Therefore, a partial collapse might have the same consequence as a total collapse. In other words, even though the State would be unable to genuinely handle the case due to a partial collapse, since the term "partial" is no longer included in article 17, it could impede the prosecution of the Court. Accordingly, there is a possibility that the perpetrator might escape punishment.

The delegations that proposed the deletion of the term "partial," argued vigorously that it was possible to have a partial collapse of a national judicial system and yet that country could still undertake a *bona fide* prosecution. They gave as an example a situation where a breakdown in one region of a State would not necessarily impede the functioning of the courts in the remaining regions.¹⁶⁰ This would be different from a state of emergency in a country. Responding to this argument, Oraá states: "[I]t is hardly conceivable that a grave emergency would not affect the whole nation one may think, for instance of grave disturbances of public order taking place in a dependent territory of a State, which do not affect the nation as a whole."¹⁶¹ Thus, it seems that in a country facing a state of emergency because of the collapse of an individual region's judicial system, the entire national judicial system would be compromised.¹⁶²

The final criterion for finding a case inadmissible is if the case is not of sufficient gravity to justify further action by the ICC. This aspect of the ILC approach proved to be non-controversial¹⁶³ and was included in the draft articles.¹⁶⁴ It was also inserted in the Rome Statute. The Statute has always had threaded through it the idea of gravity—that the Court should hear only the most serious cases of truly international concern. This is logical given that the philosophical underpinning of the ICC—as represented in paragraphs 3 and 4 of the preamble,¹⁶⁵ and in articles 1¹⁶⁶

160. *Id.*

161. JAMIE ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 29 (1992).

162. According to this interpretation, the aforementioned situation would be covered by the total or substantial collapse.

163. Holmes, *supra* note 86, at 47.

164. See, e.g., *Report of the Inter-Sessional Meeting in Zutphen*, *supra* note 115, at 43; 1998 Draft Final Act, *supra* note 116, at 41.

165. ICC Statute, *supra* note 1, pmbl. ¶ 4 (reading "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .").

166. *Id.* art. 1 ("[The ICC] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . .").

and 5¹⁶⁷—is deterrence through the threat of prosecution and punishment of grave crimes that threaten the peace, security, and well-being of the world.¹⁶⁸ If the ICC had to deal with all sorts of international crimes, including those of lesser gravity, it would be flooded with cases and would become ineffective as a result of an excessive and disproportionate workload. To a certain extent, this has already occurred at the ICTY and has necessitated the withdrawal of indictments of minor perpetrators in the political-military hierarchy.¹⁶⁹

Although “gravity” is not a defined term and it is presumably up to the Court to elaborate its meaning over time, the chapeau of articles 6, 7, and 8 give some guidance regarding the application of this criterion. The chapeau of article 8 suggests that war crimes are particularly appropriate subjects for the Court’s jurisdiction if they are part of a plan or policy or are committed on a large-scale basis. Article 7’s chapeau requires that the acts be committed “as part of [a] wide spread or systematic attack.” There is also the concept of the “group” in article 6 and its discussion of genocide. All of the above suggest that at least one element of gravity is scale. That is, the magnitude or widespread nature of the crimes may be an element of their admissibility before the Court or even of the Court’s jurisdiction. Other elements might be how heinous the offense is, or the need to distinguish between “major” war criminals and “minor” perpetrators who should be tried locally. This can best be observed through the Nuremberg experience where the major war criminals were tried by the IMTs and the minor ones were tried at the national level.¹⁷⁰

1. Complementarity and the Preliminary Rulings

The principle of complementarity reconciles two competing features and jurisdictions. The first is State sovereignty, which claims national jurisdiction over its citizens or those crimes committed on its territory, even though these crimes are of an international character and may fall under the international jurisdiction. The second feature only functions in exceptional circumstances and gives an international tribunal jurisdiction over these heinous crimes. The ICC Statute’s procedural aspects either protect national sovereignty and jurisdiction or strengthen the ICC’s

167. *Id.* art. 5 (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. . .”).

168. *Id.* pmbi. ¶ 3.

169. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 158 (1999) (citing the Order Granting Leave for Withdrawal of Charges Against Minor Offenders Govedarica, Gruban, Janjic, Kostic, Paspalj, Pavlic, Popovic, Predojevic, Savic, Babic, and Spaonja issued by Judge Riad on May 8, 1998).

170. Sadat & Carden, *supra* note 134, at 419. For a thorough discussion regarding the IMT, see *supra* Section I.B.

jurisdiction. This Section will analyze the direct impact these procedural aspects have on the principle of complementarity, and which feature of complementarity they favor in particular circumstances.¹⁷¹

Article 18 elaborates on the complementarity principle as expressed in article 17, by providing the mechanism for preliminary rulings regarding admissibility. The provision was added in a later phase of the drafting, as a further procedural filter to the benefit of States' sovereignty. The creation of a specific control aimed at evaluating the issue of admissibility when the Prosecutor decides to commence an investigation, at a very early stage, strengthens the first feature of complementarity. Such a control precedes the procedure described by article 19 relating to "challenges of the jurisdiction of the Court or the admissibility of a case."

According to article 18(1), when a State Party refers a situation to the Court¹⁷² and the Prosecutor has identified a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation *proprio motu*, the Prosecutor must initiate a pre-trial procedure.¹⁷³ It

171. That is to say that if we demanded to examine the impact of a certain provision on the principle of complementarity, the first criterion would be that this provision should function in favor of States, thus serving or strengthening the idea of complementarity through this angle. By contrast, for example, under the exceptional circumstances mentioned in article 17, the ICC would be granted primacy. Thus, when examining the impact of a certain provision on the complementarity principle, the criterion should change, since the examined provision should function in favor of the ICC and not States. Accordingly, the scope through which the examination takes place would change.

172. ICC Statute, *supra* note 1, arts. 13(a), 14.

173. *Id.* arts. 13(c), 15(3), 53(1). Article 53(1) reads:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- b) The case is or would be admissible under article 17; and
- c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

It should be noted, however, that in cases where the Prosecutor acts *proprio motu*, article 15 applies, while in the case of referral by a State Party according to articles 13(a) and 14, article 53 applies, and article 15 does not apply. Thus, the question of a Pre-Trial Chamber authorization of the commencement of the full investigation becomes moot. In those situations, the Prosecutor proceeds to the consideration under article 53(1) directly. However, one might suggest that this does not preclude the Prosecutor from relying on the criteria set under

starts by notifying “all States [P]arties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned” of the investigation commenced or about to be commenced.¹⁷⁴ In this context, a question arises whether the Prosecutor has an obligation to notify States that are not party to the Statute. One possible construction of the clause is to limit it to States Parties, and particularly “those States that would normally exercise jurisdiction over the crimes concerned.” Another construction suggests that the clause also refers to States that are not a party to the Statute. The latter view found support in the deliberate use of the conjunction “and,” and argued that it reflects the drafters’ intention to include non-party States.¹⁷⁵

article 53. This sounds logical, since rule 48 provides for a clarification of the relationship between article 15 and article 53 as follows: “[i]n determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1(a) to (c).” See also *Report of the Preparatory Commission for the International Criminal Court*, Addendum, at 31, rule 52(1), U.N. Doc. PCNICC/2000/1/Add. 1 (2000) [hereinafter ICC Rules]. The criteria set under article 53 are the appropriate criteria, and those which, inter alia, the Pre-Trial Chamber or the Trial Chamber will later rely upon at the jurisdiction and admissibility stages. Moreover, article 53 provides a further opening for prosecutorial discretion, by incorporating a consideration of interests of justice in the Prosecutor’s final determination of whether to actually proceed with an investigation following authorization by the Pre-Trial Chamber under article 15(4). In addition, article 53 ensures an equal Prosecutorial burden in all triggering modes outlined in article 13. New circumstances may arise after the Pre-Trial Chamber has given its authorization under article 15(4), which further justifies the applicability of article 53(2) on situations arising under articles 13(c) and 15. The latter is not mentioned in the Rules, but could be inferred from the entire context of the Statute. For a discussion of article 15, see generally Morten Bergsmo & Jelena Pejic, *Prosecutor*, in COMMENTARY ON THE ROME STATUTE: OBSERVERS’ NOTES, ARTICLE BY ARTICLE, *supra* note 25, at 359, 367–68, 370. However, the opinion found in that discussion was examined solely in light of the Statute, thus excluding the Rules of Procedures and Evidence, which made some changes to the final view and the appropriate construction of the Statute as mentioned above. For an updated source on this subject, see Jürg Lindenmann, *The Rules of Procedure and Evidence on Jurisdiction and Admissibility*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS, *supra* note 59, at 173, 182–84.

174. ICC Statute, *supra* note 1, art. 18(1); see also ICC Rules, *supra* note 173, rule 52(1) (“Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2.”). In case of referral by the Security Council according to article 13(b), no pre-trial procedure or notification is necessary. In this regard, Benvenuti observed that this distinction may be considered reasonable, because there is no need for a specific filter aimed at protecting State sovereignty when the Prosecutor proceeds as a result of a referral of a situation by the Security Council acting under Chapter 7 of the U.N. Charter: in this case the principle of domestic jurisdiction is not supposed to work in favor of States. Benvenuti, *supra* note 16, at 47.

175. Daniel D. Nsereko, *Preliminary Rulings Regarding Admissibility*, in COMMENTARY ON THE ROME STATUTE, *supra* note 25, at 395, 399.

However, if this is true, why does paragraph 5 mention, "States Parties shall respond to such requests without undue delay?"¹⁷⁶ One possible answer is that this paragraph suggests that the drafters' intention was to limit the application of article 18 to States Parties only. The correct answer is that drafters could not apply the strong language in paragraph 5 to non-party States, but this does not change the overall application of article 18 to non-party States. The term "undue delay" provides the key to the appropriate interpretation of paragraph 5. The drafters used the word "undue" instead of the word "unjustified" mentioned in article 17(2)(b). According to the drafting history, the term "unjustified" is more lenient and leaves room for justification in case of any delay, while the term "undue" removes this opportunity. In addition, the strict language of paragraph 5 suggests that it is imposing an obligation upon those States to respond to the Prosecutor's requests without any delay, even if justified. Since "a treaty does not create either obligations or rights for a third State without its consent,"¹⁷⁷ the drafters could not have mentioned third States in this context. Accordingly, one can deduce that the Prosecutor is obliged to notify non-party States.

It was suggested that the purpose of the notification would seem to be twofold: To give general information to the general assemblage of States Parties, and to put on notice those States that might otherwise have jurisdiction,¹⁷⁸ that the Prosecutor intends to investigate the matter. The State concerned is thus given an opportunity either to allege jurisdiction or to allow the Prosecutor to proceed with the investigation.¹⁷⁹

The notification might be held on a confidential basis, according to the prosecutorial assessment.¹⁸⁰ The Prosecutor may decide to limit the scope of information provided to the States, in order to ensure that the information does not fall into the wrong hands. Revealing the information to the wrong people may hurt innocent individuals, particularly potential witnesses and other providers of information, or may destroy evidence, or assist suspects and witnesses to abscond justice.

Apparently, these privileges seem to empower the Prosecutor with a broad discretionary assessment. Article 18(1) left it to the Prosecutor to determine how much information is presented to States. Nevertheless,

176. Cassese, *supra* note 169, at 159. However, according to Cassese, article 18 applies also to "[t]hird [S]tates, i.e. [S]tates that are not parties to the Statute." *Id.*

177. Vienna Convention, *supra* note 95, art. 34.

178. An example of a scenario where a State may otherwise have jurisdiction is a State whose citizen commits one of the crimes within the Court's jurisdiction while in the territory of a State Party.

179. See also Nsereko, *supra* note 175, at 399.

180. ICC Statute, *supra* note 1, art. 18(1); see SCHABAS, *supra* note 125, at 102.

rule 52(2)¹⁸¹ seems to weaken this discretionary assessment, since it grants States the right to request additional information from the Prosecutor. Thus, it might hinder the main purpose of article 18(1), that is, to preserve valuable or other significant evidence, since according to this rule the State can request it and destroy it or otherwise hinder the investigation.

This analysis of article 18 suggests that the idea of notification is dangerous and has a double impact on the principle of complementarity. Although it apparently strengthens the first feature of complementarity, because it encourages States to act and exercise their primary jurisdiction, it also impedes the second feature of complementarity, that of effective international prosecution. If a State was acting in bad faith, once it received the information from the Prosecutor, it could destroy this evidence or act in other ways to allow the accused to escape justice, while pretending that it is investigating or prosecuting the case. Therefore the second feature of complementarity would be impeded, and the ICC's primary jurisdiction to act in such exceptional cases might be thwarted due to the State's false assertion.¹⁸² However, Bergsmo, suggests that this problem could be partially ameliorated by article 18(6) which says that the Prosecutor may, on an exceptional basis, request authorization from the Pre-Trial Chamber to "pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."¹⁸³ By contrast, Cassese wonders whether the provisions of paragraph 6 are sufficient when "one is faced with a [S]tate bent on shunning international jurisdiction and therefore unwilling to cooperate in the search for and

181. Rule 52(2) reads, "[a] State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the one-month time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis." ICC Rules, *supra* note 173, rule 52(2).

182. Notifying and providing the State concerned with further information will strengthen this assertion. *See* Cassese, *supra* note 169, at 159. Cassese has also taken a similar view. He expressed his opinion in the following words:

Complementarity might lend itself to abuse. It might amount to a shield used by [S]tates to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, [S]tate authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons.

Id.

183. Bergsmo, *supra* note 130, at 45.

collection of evidence, or even willing to destroy such evidence to evade justice.”¹⁸⁴

Article 18(2) obliges the Prosecutor to defer to a State investigation if informed of the existence of such investigation within one month of the notification sent to all States Parties and other States which would normally exercise jurisdiction.¹⁸⁵ The only exception is if the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the Prosecutor to investigate.¹⁸⁶ To receive this authorization, the Prosecutor bears the evidentiary and legal burden to show by a preponderance of evidence that valid grounds exist to justify the Prosecutor’s investigation.¹⁸⁷ Additionally, the Prosecutor in submitting the application before the Pre-Trial Chamber can also rely on the criteria for holding a case admissible, listed under article 17.

184. Cassese, *supra* note 169, at 159.

185. However, in this context, what if a State that prior to receiving the Prosecutor’s notification has not investigated the acts subject to the notification, but prompted by the notification, now wishes to institute investigations into those acts? Is it precluded from requesting the Prosecutor to defer to its jurisdiction? The general conclusion is that it is not. The spirit and general tenor of the Statute is to give due deference to State jurisdiction according to the complementarity regime. So a State that has not yet started investigations, but is otherwise able and willing to do so, must be given a chance to exercise its jurisdiction under article 18(2). Another question might pose itself in this regard, where the State concerned does not respond at all to the Prosecutor’s notification or, if it does, it does not “request” the Prosecutor to defer to its investigations. In fact, the logical answer would be that the Prosecutor might go ahead with his or her investigations. However, in such a case, both the State and the Prosecutor may be concurrently investigating the same matter. Such a situation runs counter to the spirit and purpose of the Statute, since the Statute is to function based on the principle of complementarity and not concurrent jurisdiction as it is in the *ad hoc* tribunals. Nevertheless, if the Prosecutor proceeds to file a case before the Court whilst the State’s investigation or proceedings are still pending, such a case may be ruled inadmissible by the Court under article 17, unless it is shown that it falls under the exceptions of that article.

186. See ICC Statute, *supra* note 1, art. 15(4); see also ICC Rules, *supra* note 173, rule 53 (“When a State requests a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and provide information concerning its investigation, taking into account article 18, paragraph 2. The Prosecutor may request additional information from that State.”); *id.* rules 54 and 55. Rule 54 reads:

1. An application submitted by the Prosecutor to the Pre-Trial Chamber in accordance with article 18, paragraph 2, shall be in writing and shall contain the basis for the application. The information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber;
2. The Prosecutor shall inform that State in writing when he or she makes an application to the Pre-Trial Chamber under article 18, paragraph 2, and shall include in the notice a summary of the basis of the application . . .

Rule 55(2) reads: “[t]he Pre-Trial Chamber shall examine the Prosecutor’s application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and shall consider the factors in article 17 in deciding whether to authorize an investigation.” *Id.*; see also Bergsmo, *supra* note 130, at 44; Sadat & Carden, *supra* note 134, at 420.

187. Nsereko, *supra* note 175, at 401.

The Pre-Trial Chamber's decision is subject to appeal,¹⁸⁸ but if the State avails itself of this right, it cannot attack the investigation or prosecution on the basis of admissibility unless there is a subsequent change of circumstances or additional significant facts are raised.¹⁸⁹

If the Prosecutor defers to a State's investigation,¹⁹⁰ she or he may review the deferral after six months or whenever there has been a "significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation."¹⁹¹ This provision allows the Prosecutor to monitor and reassess the State's ability and willingness to administer justice.¹⁹² In this context, one might suggest that this provision should be read in conjunction with article 18(5). At the lapse of six months the Prosecutor may review the deferral, and may request to be kept periodically apprised of the progress of the investigations and any subsequent prosecutions without "undue delay." In this regard, the inclusion of this strict language suggests that the idea of delaying the response in this context is entirely unacceptable. When a State undertakes to investigate and prosecute those heinous crimes it does so as an agent, and on behalf of the entire community. Hence, it is only fair that the State be accountable to the Prosecutor, who is otherwise responsible for investigating and prosecuting those crimes on behalf of the international community. Failure on the part of the State to respond at all or in a timely manner would be grounds for the Prosecutor to review the deferral and seek the Pre-Trial Chamber's authorization to initiate an investigation.¹⁹³ This seems logical, since paragraph 5 appears to forestall any attempt to escape justice. Furthermore, paragraph 5 strengthens the first feature of the complementarity regime, since the monitoring authority provided to the Prosecutor could frighten States and encourage them to act in good faith.

If the Prosecutor observed any change of circumstances based on the State's unwillingness or inability prior to or subsequent to the six months

188. ICC Statute, *supra* note 1, art. 18(4), 82(1)(a),(d).

189. *Id.* art. 18(7). In this regard, a State which has challenged a ruling by the Pre-Trial Chamber under article 18 is not prevented from challenging the admissibility under article 19 on the grounds of "additional significant facts or significant change of circumstances." For a discussion concerning this issue, see Bergsmo, *supra* note 130, at 361; Nsereko, *supra* note 175, at 404; Sadat & Carden, *supra* note 134, at 420.

190. It should be noted, however, that the Prosecutor's deferral applies not only to States Parties, but also to third States. For a detailed discussion on this issue, see Gerhard Hafner, *The Status of Third States before the International Criminal Court*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 239, 248–49 (Mauro Politi & Giuseppe Nesi Politi eds., 2001).

191. ICC Statute, *supra* note 1, art. 18(3).

192. Ruth B. Phillips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L.F. 61, 80 (1999).

193. Nsereko, *supra* note 175, at 403.

period, she or he will investigate the matter subject to the Pre-Trial Chamber's authorization. However, the Prosecutor must show by a preponderance of the evidence that such a change has occurred. Accordingly, the State concerned is also given the opportunity to appear before the Pre-Trial Chamber and oppose the Prosecutor's application for authorization to investigate a matter with which it is already supposedly seized.

Paragraph 3 buttresses the two features of the complementarity principle. On the one hand, the provision for monitoring a State's investigation assures that States are acting *bona fide* in their exercise of national jurisdiction. The provision fulfills the main purpose of the complementarity regime of not trampling on national sovereignty and jurisdiction unless necessary. On the other hand, authorizing the Prosecutor to intervene when the State concerned is acting in bad faith ensures that the second feature of complementarity is functioning, that is, that the Court can assert primacy in case of unwillingness or inability.

Based on the foregoing, the provisions of article 18 in general appear to empower the complementarity regime. However this regime, through the provisions of article 18, seems to have a negative impact on the functioning of the ICC. According to Hans Kaul, the principle of complementarity is strengthened by the article 18 preliminary rulings regarding admissibility, one of the "safe-guard provisions" which the American delegation forcefully pushed into the Statute. He observed that while a strong complementarity regime sounds positive—in reality it means a considerable weakening of the Court. He further argues that a State, especially if this State is not acting *bona fide*, can erect procedural obstacles with this provision,¹⁹⁴ and impede the expeditious and appropriate functioning of the Court.

2. Complementarity & Challenges to the Jurisdiction of the Court or the Admissibility of a Case

Article 19 seems to supplement the provisions of article 18, but at a latter stage and in a broader sense. Unlike article 18, which is applicable only in a case of referral of a situation by a State Party and in case of an investigation by the Prosecutor *proprio motu*,¹⁹⁵ article 19 applies to "Security Council referrals and cases in which States do not open investigations" in response to a Prosecutor's notification.¹⁹⁶ Moreover, it increases the categories of parties who could bring challenges to the ju-

194. See, e.g., Hans-Peter Kaul, *The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship To National Jurisdictions*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 190, at 59–60.

195. ICC Statute, *supra* note 1, art. 18(1).

196. Sadat & Carden, *supra* note 134, at 420.

jurisdiction and admissibility before the Court.¹⁹⁷ This does not preclude the possibility of the Court¹⁹⁸ and the Prosecutor¹⁹⁹ also availing themselves of this right. Indeed, the Court, on its own motion, may determine the admissibility of a case brought before it,²⁰⁰ but in doing so, it must always satisfy itself that it has jurisdiction²⁰¹ in any case brought before it.²⁰²

An international court has the power to determine whether it has jurisdiction in a particular case, even if there is no express provision giving it the power to do so. In the *Tadic* case, the Appeals Chamber stated that the power of a court to determine whether it had competence,

is part, and indeed, a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its jurisdiction to determine its own jurisdiction. It is a necessary component in the exercise of the judicial function and does not

197. Article 19(2) stipulates that challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- c) A State from which acceptance of jurisdiction is required under article 12;

ICC Statute, *supra* note 1, art. 19(2); *see also* ICC Rules, *supra* note 173, rule 133. However, there is a clear distinction between articles 18 and 19 in this respect. Article 19 seems to widen the categories that can challenge the admissibility of a case—unlike article 18, which limits a challenge to admissibility of an investigation to a State Party or the Prosecutor acting *proprio motu*—still there is a technical distinction between them. Article 18 refers to situations referred to the Court, while article 19 refers to individual cases, a further procedural step, which is discussed in more detail below.

198. ICC Statute, *supra* note 1, art. 19(1).

199. *Id.* art. 19(3).

200. M. Cherif Bassiouni, *Explanatory Note on the ICC Statute*, 71 INT'L REV. PENAL L. 1, 20 (2000).

201. It is noteworthy that article 53(2) of the ICJ Statute uses a similar term to that of article 19(1). Article 53(2) of the ICJ Statute reads, "[t]he Court must . . . satisfy itself, not only that it has jurisdiction in accordance with articles 36 and 37, but also that the claim is well founded in fact and law." Statute of the International Court of Justice, June 26, 1945, art. 53(2), 59 Stat. 1055; *see also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). The Court defined the term as follows,

the use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.

Id.

202. ICC Statute, *supra* note 1, art. 19(1); *see also* ICC Rules, *supra* note 173, rule 58(4) (stipulating, "[t]he Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility").

need to be expressly provided for in the constitutive documents of those [t]ribunals.²⁰³

Thus, the ICC has a duty to determine its own competence and therefore, the requirement in paragraph 1 that the Court “shall satisfy itself that it has jurisdiction in any case brought before it,” was not critically essential.²⁰⁴

This duty is limited to “any case” which is “brought before it,” which is narrower than the term “a situation” within the meaning of articles 13, 14, and 18. These terms were discussed in the 1996 PrepCom and at the Rome Conference, but regarding different issues, that is, granting *ex officio* powers to the Prosecutor. During the drafting process, some of those who opposed granting *ex officio* powers to the Prosecutor contended that the ICC Prosecutor would have the same independence as the Prosecutors of the two Ad Hoc Tribunals to initiate an investigation once a “situation” had been brought to the Prosecutor’s attention by the Security Council or a State’s complaint. They argued that the powers of the Prosecutor could be broadened, if the complaint referred to “situations” rather than individual “cases.”²⁰⁵

In the 1996 PrepCom, the United States introduced a similar proposal, which was supported by a large majority of States. It is argued that the main reason for this support was that many States were uneasy with the regime provided for in the ILC Draft Statute, which allowed a State Party to select individual cases of violations and lodge complaints with the Prosecutor with respect to such cases. This could, in their view, encourage politicization of the complaint procedure. Instead, according to the United States’ proposal, States Parties would be empowered to refer “situations” to the Prosecutor in a manner similar to that provided for the Security Council. Once a State Party refers a situation to the Prosecutor, the Prosecutor could then initiate a case against the individual or individuals concerned.²⁰⁶

At the Rome Conference, this problem emerged once more, but in a different context, namely, in regard to the Security Council’s referrals. Among those delegations supporting referrals by the Security Council, there was a division as to whether the Council should refer “matters,” or “situations.” The majority of delegates rejected the possibility of referring “cases” by the end of the preparatory negotiations, finding “cases”

203. Appeals Decision on Jurisdiction, *supra* note 60, ¶ 18.

204. Christopher K. Hall, *Challenges to the Jurisdiction of the Court or the Admissibility of a Case*, in COMMENTARY ON THE ROME STATUTE, *supra* note 25, at 405, 407.

205. Silvia A. Fernandez, *The Role of the International Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 86, at 180.

206. *Id.*

to be too narrow and not mindful enough of the Court's independence in the exercise of its jurisdiction. Consequently, only the "matters" and "situation" were submitted to the Diplomatic Conference. As between these two terms, those who preferred the narrow concept of a "matter" did so on the basis of the need for some degree of specificity in the referral before the Court could assert jurisdiction, while those who preferred "situation" argued that the referral of a "matter" by the Council was still too specific for the independent functioning of the Court. In the end, the latter view prevailed and the term "situation" was adopted.²⁰⁷

The entire process before the ICC starts with a referral of a situation to the Prosecutor. Then the Prosecutor conducts the investigation, which is monitored by the Pre-Trial Chamber through the different stages. In the end the Prosecutor decides whether to file a case (within the narrow meaning mentioned in the above paragraph). Then article 19 comes into play, once a real case exists and someone is charged with committing one of the crimes listed in article 5 of the Statute. Thus, the requirement that a "case" be "brought before" the Court (presumably, the Pre-Trial Chamber or Trial Chamber according to article 19(1)) implies some formal proceedings beyond the initiation of an investigation of a situation in response to a referral and at a later stage than the questioning, under article 55, of a suspect still at liberty. Such formal proceedings might include an application for a warrant under article 58.²⁰⁸ Thus, according to article 19, the Court would not have a duty to make a determination, on its own motion, of whether it had jurisdiction over an investigation into a situation (as opposed to a case) being conducted by the Prosecutor.²⁰⁹ This sounds logical, since part of the investigation of the situation

207. Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 86, at 143, 147–48.

208. In this respect,

[t]he Pre-Trial Chamber decision pursuant to Article 15(3) [sic] to authorize the Prosecutor to commence an investigation *proprio motu* would not bring a case "before" the Court within the meaning of Article 19(1), even though it mentions the word "case". The history and structure of Articles 13(c) and 15 demonstrate that their purpose is to permit the Prosecutor to investigate an entire "situation," not to make a definitive decision whether an individual case is admissible. Under article 15(3) [sic], the Pre-Trial Chamber does not formally determine that a case "brought before it" is admissible, but simply makes a determination "that there is a reasonable basis to proceed with an investigation," and that "the case *appears* to fall within the jurisdiction of the Court, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case".

Hall, *supra* note 204, at 408 n.8 (emphasis added) (text mistakenly refers to Article 15(3) instead of 15(4)). However, this does not mean that the Pre-Trial Chamber is precluded from determining "that there is a reasonable basis to proceed with an investigation" in light of articles 17 and 53(3)(a).

209. Hall, *supra* note 204, at 407–08.

by the Prosecutor will be to determine whether the Court has jurisdiction.²¹⁰

Meanwhile, article 19(1) also provides that the Court (the Pre-Trial Chamber or Trial Chamber) has the discretion, on its own motion, to determine the “admissibility of a case in accordance with article 17.” By contrast to the duty of the Court to determine whether it has jurisdiction in a case brought before it, paragraph 1 does not restrict the Court’s ability to make an admissibility determination only with respect to a “case” brought before it. It may decide on admissibility at an earlier stage than when asked to issue a warrant under article 58.²¹¹ Moreover, the Prosecutor also has a duty under article 53(1)(b) to consider the question of admissibility in the early stages of an investigation. The Pre-Trial Chamber may review the Prosecutor’s conclusions in light of article 53(3)(a). However, according to Hall, the Court would only review the Prosecutor’s admissibility conclusions if an admissibility challenge were brought pursuant to article 19(2), unless clear circumstances require an admissibility determination in the interests of justice.²¹²

While complementarity is a right accruing to States, a specified class of individuals may invoke complementarity on behalf of a State with jurisdiction. Article 19(2)(a) permits an accused²¹³ or a person “for whom a warrant of arrest or a summons to appear has been issued” to challenge the jurisdiction or the admissibility of a case before the ICC.²¹⁴ However, article 19(2)(b) specifies that challenges to the admissibility of a case or the jurisdiction of the Court on the grounds referred to in article 17 “may be made by” a “State which has jurisdiction over a case,”²¹⁵ on the ground

210. ICC Statute, *supra* note 1, art. 53(1)(b).

211. Hall, *supra* note 204, at 408.

212. *Id.*

213. It could be argued that, although the Rome Statute does not provide a definition for “accused,”

[i]t would be consistent with the structure of the Statute and the Rules of Procedure and Evidence of the ICTY and ICTR to define an accused for the purposes of Article 19, as a person identified in the “the document containing the charges” referred to in Article 61(3)(a), as of the moment the document is provided to the Pre-Trial Chamber, whether “in camera” pursuant to a sealed indictment or publicly, rather than at the stage the charges are confirmed in accordance with Article 61(7)(a), and to consider the person as an accused under the Statute until the charges are not confirmed or the person is acquitted or convicted.

Id. at 409; *see also* ICTY Rules Proc. Evid. 2(a), U.N. Doc. IT/32/REV. 24 (2002) (defining an accused as “a person against whom an indictment has been submitted in accordance with Rule 47”). Rule 47 specifies the different stages for confirmation of the indictment by a Judge. *Id.*

214. *See generally*, ICC Rules, *supra* note 173, rule 58; Newton, *supra* note 121, at 56, 57.

215. At the Rome Conference, one of the problems that emerged was whether a non-party State could make a challenge. Although many delegations from the “like-minded” States

that it is investigating or prosecuting the case or has investigated or prosecuted.”²¹⁶

Since all States under international law may exercise universal jurisdiction over the crimes within the Court’s jurisdiction,²¹⁷ it is likely that paragraph 2(b) meant only those States which had provided their own courts with jurisdiction over the case under national law. Jurisdiction could be based on territory, the protective principle, the nationality of the suspect or the victim, or universality.²¹⁸ However, according to Benvenuti, who favors a stricter construction, if the principle of complementarity was applied to every State on the basis of any possible jurisdictional link, it could block effective prosecution in a large number of cases. Indeed, any State could invoke the principle of universal jurisdiction and initiate a prosecution before its domestic courts, thereby impeding the work of the ICC.²¹⁹ Thus, it seems rather more persuasive to limit the principle of complementarity to those national jurisdictions that are directly connected to the criminal conduct or to the accused.²²⁰ This makes sense and coincides with the spirit and purpose of the Statute.

It is noteworthy that, although the chapeau of paragraph 2 refers to “challenges to the admissibility of a case on the grounds referred to in article 17,” an examination of the language of subparagraph (b) suggests that it limits these grounds to those listed in article 17(a) and (b).

believed that only States Parties to the Statute should have this right, many other delegations insisted that the principle of complementarity should apply to the Court regardless of whether the national proceedings were being conducted by a State Party or a non-party State. The latter delegation feared the real possibility that concurrent investigations or prosecutions could occur, which could jeopardize the efficacy of both. Holmes, *supra* note 86, at 66.

216. *Id.* at 67. In this context, “it is not enough that a State had instituted national proceedings, it must establish to the Court that it had jurisdiction in the case.” *Id.* This addition was intended to forestall situations where a State could challenge (and delay) the Court from proceedings with a case on the ground that it was investigating when in fact the investigation or prosecution was sure to fail because the State lacked jurisdiction even as far as its own courts were concerned. *Id.*

217. Regarding the crime of genocide, see, for example, The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. and Herz. v. Yugoslavia), 1996 I.C.J. 27–33 (July 11).

218. Hall, *supra* note 204, at 410.

219. In this respect, if one demanded to follow the wider interpretation—namely, that any State could assert jurisdiction based on universality, absent any direct connection to the conduct—it could be argued that this could have a negative effect on the second feature of complementarity. In other words, although the wide construction appears to strengthen the first feature of complementarity, that national jurisdiction is superior, it weakens the second feature of complementarity, if, for example, the State concerned was able and willing but the case oversteps the gravity test and should be tried under the ICC’s authority.

220. Benvenuti, *supra* note 16, at 48 (observing “these national jurisdictions may reasonably be presumed to be the ones in a position to collect evidence and testimony of the crime and/or implement a judgment, but are unwilling or unable to act”).

Therefore, it excludes the circumstance where a person has already been tried and the gravity test as viable admissibility challenges.

A close reading of the entire article reveals that the above interpretation may not be the correct one. From paragraph 4 one might deduce that it covers the situation when a person has already been tried. The gravity test however is not mentioned anywhere in article 19. The main challenges to admissibility remain that the State concerned has conducted, is conducting or will conduct an investigation and a prosecution. However, a State may argue that a case lacks gravity, thereby adding an extra argument to its admissibility challenge. For example, a State could challenge the admissibility of a case on the ground that it has investigated the case. In order to enhance its argument, it could claim that according to its investigation and final determination, it concluded that the case is not of sufficient gravity to justify further action by the Court. This example demonstrates that it is possible to apply article 19(2)(b) in an extended manner in order to overstep the gaps of the Statute. Although article 19 appears to exclude "gravity" as a ground for challenging the admissibility of a case, this example demonstrates that the absence of "gravity" does not prevent a State from using it to bolster its argument.

Another problem which might hamper the Court's determination of admissibility challenges emerges from reading article 19(2) in conjunction with article 17(1). First, article 19(2)(b) makes reference to a State that has prosecuted a case. This situation is not defined nor mentioned in article 17(1). Article 17(1)(a) refers to a case, which is "being investigated" or being "prosecuted." Article 17(1)(b) refers to a case, which has been investigated, and in which the State decided not to try the person concerned. Thus, in this context, the text of article 17(1)(b) should have included the following language: "The case has been investigated or prosecuted by a State which has jurisdiction over it and the State has decided not to prosecute or try the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute or try such a person."

Based on the foregoing, one wonders how would the Court rule on a challenge, made according to article 19(2)(b) that argues that the State has prosecuted the case, since the latter criterion is not mentioned in article 17(1)? In other words, when the Court is ruling on an admissibility challenge, in order to decide that a case is inadmissible, it should use the criteria set out in article 17. However, because article 17 lacks the aforementioned criterion, the Court might be legally paralyzed to rule on any admissibility challenge based on this particular ground.

There is another possibility unaccounted for in the Statute. If the Court interprets article 19(2)(b) in a strict manner, it would limit a State's challenges to those situations mentioned in the text. What would be the Court's determination if a State challenged the admissibility of a case on the ground that it has already prosecuted the case, and now is unwilling or unable to carry out a trial? How could the Court decide that the case is admissible, absent any criterion for determining unwillingness or inability in article 19? These questions suggest that article 17 is the main guide for the admissibility test. However, there is a gap in paragraph 1, which the drafters seem to try to overstep through article 19(2)(b).²²¹

Even if a State does not fit the criteria set out in article 19(2)(b), paragraph 2(c) allows some States another challenge. It allows a State from "which acceptance of jurisdiction is required under article 12" to challenge the jurisdiction of the Court and the admissibility of a case. Acceptance of a State's jurisdiction is not required if the Security Council, pursuant to article 13(b), refers a situation to the Prosecutor. However, acceptance by a State is required when a situation is referred to the Prosecutor by a State according to articles 13(a) and 14, or when the Prosecutor has initiated an investigation *proprio motu* in accordance with articles 13(c) and 15(1). Thus, in those circumstances, article 12(2) requires the acceptance of jurisdiction by the State on whose territory, vessel or aircraft the crime occurred—the territoriality principle²²²—or the State of the accused's nationality—the active personality principle.²²³ Reading article 19(2)(c) in conjunction with articles 12 and 13, one could conclude that the State, who is not a party to the Statute, but whose national is suspected of a crime, cannot make a challenge to jurisdiction or admissibility until the suspected person is accused.

221. However, according to Professor William Schabas, this gap was not forgotten, but the drafters left it intentionally. Interview with William Schabas, Professor, National University of Ireland, in Galway, Ir. (Sept. 25, 2001).

222. Obviously, this might give rise to practical conflicts between States asserting jurisdiction on the basis of the two related types of the "territoriality principle," namely, the "subjective territoriality," and the "objective territoriality." "While subjective territoriality requires an element of the offense to occur within the asserting [S]tate, objective territoriality obtains when the effect or result of criminal conduct impacts on the asserting [S]tate, but the other elements of the offense take place wholly beyond its territorial boundaries." Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in *INTERNATIONAL CRIMINAL LAW*, *supra* note 2, at 33. For a thorough discussion on the basis of jurisdiction, see *id.* at 33–70.

223. *Id.*; see also M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 295–312 (1996) [hereinafter BASSIOUNI, *INTERNATIONAL EXTRADITION*]; Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 63 *LAW AND CONTEMP. PROBS.* 1, 44–45 (2000); Sharon A. Williams, *The Rome Statute on the International Criminal Court: From 1947–2000 and Beyond*, 38 *OSGOODE HALL L.J.* 298, 322–24 (2000).

It should be noted, however, that paragraphs 2(b) and (c) might also cover challenges to the jurisdiction or admissibility of a case by a State, which has challenged a ruling of the Pre-Trial Chamber under article 18(7). States that have had their article 18 preliminary challenges rejected by the Pre-Trial Chamber may make a further challenge pursuant to article 18(7) to the admissibility of the case under article 19(2) and (4). This additional challenge is subject to the existence of "additional significant facts or significant changes of circumstances,"²²⁴ which should limit frivolous challenges.

Because of this additional challenge one can imagine a situation where the Pre-Trial Chamber rejected the State's challenge on the basis of article 17, and the State decides to challenge admissibility again under article 18(7).²²⁵ Should a State that the Court found was unwilling to carry out an investigation or prosecution be give a second chance and another opportunity to impede justice? What about a State whose proceedings "were undertaken, or the decision was made to shield the person concerned from criminal responsibility?"²²⁶ Or one whose proceedings "were not being conducted independently or impartially?"²²⁷ Is it possible that "additional significant facts or changes of circumstances" would indicate a State's willingness to act, even though the State has already revealed its bad intentions earlier? One can imagine that a State that was unable to carry out its duties due to the collapse or unavailability of its judicial system might become able at a later time due to changed circumstances. The only possibility that a State, which has demonstrated its unwillingness to act can later conduct a *bona fide* investigation or prosecution, is that its government has changed. This seems the only sensible reason for article 18(7). It reflects the drafters' intention to create a complementarity regime and emphasize the favoring of national rather than ICC jurisdiction.²²⁸

Article 19(3) entitles the Prosecutor to seek a ruling from the Court on a question of jurisdiction or admissibility. In such proceedings victims and those who referred the situation under article 13²²⁹ may submit

224. ICC Statute, *supra* note 1, art. 18(7).

225. Although article 17 is not mentioned under article 18 as a ground for determination to authorize an investigation, from a reading of the mechanism of the Statute, it might be deduced that the Pre-Trial Chamber or the Appeals Chamber take into account the criteria set under article 17 in addition to other factors that might emerge before them.

226. ICC Statute, *supra* note 1, art. 17(2)(a).

227. *Id.* art. 17(2)(c).

228. This makes sense, since States consider that international intervention touches the very essence of their sovereignty. For a thorough discussion on this issue, see *supra* Part I.

229. Hall argues:

Although the impetus for this provision was the intent to ensure that the victim's right to be heard at all stages of the proceedings was effectively guaranteed, the

observations to the Court.²³⁰ Rule 59 extends this right of victims and of the referring party to challenges submitted by a State or by the accused under article 19(2).²³¹

The Prosecutor may obtain a prompt ruling from the Court on the questions of admissibility and jurisdiction at any stage, whether the question relates to an entire situation or to an individual case. Since the text of article 19(3) does not limit the Prosecutor's ability to "seek a ruling regarding a question of jurisdiction or admissibility" to a "case," the Prosecutor may also seek a ruling in regard to situations. In addition, she or he could seek a prompt determination that a State's judicial system was unable or unwilling genuinely to investigate or prosecute, thus making all investigations or prosecutions admissible in that State. This procedure would conserve the Court's resources by not having each individual case litigated in a piecemeal fashion.²³²

As a general rule, according to article 19(4) a State or a person mentioned in paragraph 2 is permitted only one challenge to a determination of jurisdiction or admissibility. This challenge must be brought prior to or "at the commencement of the trial."²³³ This provision was introduced to ensure a degree of finality.

However, some exceptions still exist. While challenges to the jurisdiction of the Court must be made prior to or at the commencement of trial, in "exceptional circumstances" they may be made at a time

language is broad and clear enough to include the Security Council or a State which referred the situation to the Court. The term "proceedings with respect to admissibility" is broad enough to include proceedings regarding preliminary challenges to admissibility under Article 18.

Hall, *supra* note 204, at 412.

230. See ICC Rules, *supra* note 173, rule 59, 133(3) (regulating the proceedings under article 19(3)). According to Hall, those who have the right to submit observations are not limited to written submissions, "so the Court would be free to permit oral interventions." Hall, *supra* note 204, at 411. However, rule 59(3) states, "[t]hose receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time as it considers appropriate." ICC Rules, *supra* note 173, rule 59(3). Thus, it is not clear whether the Court limits such representation to written submissions or may extend this by allowing also oral observations. Nevertheless, one may suggest that oral observations may be possible also, since rule 58(2) allows the Court to "hold a hearing" separately or "[i]t may join the challenge or question to a confirmation or a trial proceeding . . . and in this circumstance shall hear and decide on the challenge or question first." *Id.* rule 58(2).

231. ICC Rules, *supra* note 173, Rule 59(3); see also Lindenmann, *supra* note 173, at 188.

232. Hall, *supra* note 204, at 411.

233. In this respect, article 19(5) assures that the general rule (and not the exception) is that challenges shall be made at the earliest opportunity. According to Bassiouni, the phrase "at the earliest opportunity" implies that this challenge generally must be made prior to or at the commencement of trial. Bassiouni, *supra* note 200, at 20. However, one could argue that this interpretation does not cover the exceptional circumstances mentioned under article 19(4). *Id.*

subsequent to the commencement of the trial. Challenges to the admissibility of a case are limited to the period prior to the start of a trial. They may be brought at the commencement of a trial or subsequently, on grounds of *ne bis in idem*. It seems that the drafters' intention was to narrow the possibility of challenges to admissibility at later stages. Prior to the confirmation of charges, challenges will be directed to the Pre-Trial Chamber and, afterwards, to the Trial Chamber.²³⁴ The rulings of either Chamber are appealable in accordance with article 82. Article 82(1)(a) provides that "either party may appeal . . . a) A decision with respect to jurisdiction or admissibility." The term "either party" is not defined and even the Rules of Procedure and Evidence are silent regarding this issue. It presumably would include a State making a jurisdictional or admissibility challenge. An examination of the text of articles 19, 56(3), and 82(1)(c), implies that this right is not limited to a State making a jurisdictional or admissibility challenge. Thus, it might extend to cover a person under article 19(2)(a)²³⁵ and the Prosecutor as well.²³⁶ Furthermore, one assumes that whoever is granted the right to challenge admissibility should also be granted the right to appeal the resulting decision.

234. SCHABAS, *supra* note 125, at 102–03; *see also* ICC Statute, *supra* note 1, art. 19(6); ICC Rules, *supra* note 173, rule 60 (regulating the procedures to be followed subsequent to the confirmation of the charges but before the constitution or designation of the Trial Chamber). Rule 60 reads:

[i]f a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130.

Id. Rule 130 reads, "[w]hen the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber." *Id.* rule 130.

235. One of the main concerns, which emerged during the drafting process, is to avail an accused the right to appeal a ruling on admissibility in accordance with article 82. Delegations who opposed the right to appeal, on an interlocutory basis, a ruling on admissibility, pointed out that an accused can preserve his or her objection at the trial and maintain it for a later appeal against any final judgment, pursuant to article 81. *See* Helen Brady et al., *Appeal and Revision*, in *THE INTERNATIONAL CRIMINAL COURT: MAKING OF THE ROME STATUTE*, *supra* note 86, at 299, 300.

236. *See* ICC Statute, *supra* note 1, art. 56(3)(b) (stipulating, "[a] decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor"); *see also id.* art. 82(1)(a), (c) (stipulating, "[e]ither party may appeal any of the following decisions . . . a) A decision with respect to jurisdiction or admissibility; . . . c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3"). Thus, a literal reading of the two articles in conjunction might lead one to conclude that the Prosecutor also is authorized to appeal "[a] decision with respect to jurisdiction or admissibility." ICC Statute, *supra* note 1, art. 82(1)(a).

On the other hand, paragraph 4 also permits the Court “in exceptional circumstances” to grant leave for a challenge to be brought more than once. Such circumstances are not spelled out. Professor Hall argues that it

would be consistent with judicial economy and with due process to limit “exceptional circumstances” in a challenge to admissibility to adopt a standard similar to that in Article 84(1)(a) for revision of convictions or sentences, which would require that the challenge based on newly discovered information be sufficiently important so that the decision on the ruling on admissibility would have been different. Given that both the State and the Court have concurrent jurisdiction over the crimes, if the Court has determined that a case was admissible, the right of the accused to a prompt trial would appear to outweigh the State’s interest in trying the case, as a transfer of the case to the State’s court would lead to delay.²³⁷

Consequently, the closer a case is to trial the more exceptional the circumstances would have to be to permit a second challenge to admissibility under article 17(1)(a)(b). It is possible to imagine a situation where records of a previous trial, in a State where the judicial system has broken down, were not available—through no fault of the accused—at the time of the first challenge based on article 17(1)(c).²³⁸

Although article 19(4) appears to strengthen the feature of the complementarity regime favoring States by granting any person or a State referred to under article 19(2) multiple challenges, a thorough reading of paragraph 4 reflects the opposite. The last part of paragraph 4 restricts challenges to the admissibility of a case to a situation based on *ne bis in idem*. The *ne bis in idem* provision seems to deal only with the grounds and timing for challenging the admissibility of a case, and not with the number of challenges. However, a closer reading of article 19(4) reveals that in practice it will limit even the number of challenges. For example, if one challenge is brought prior to trial, the second challenge will probably not be brought during the same period, but at a later stage—at the commencement of trial or subsequently “with the leave of the Court.” However, these latter challenges must be article 17(1)(c) or *ne bis in idem* challenges. As a result, a State or a person concerned will not bring multiple challenges to admissibility in this context arbitrarily. This outcome makes sense, because allowing several challenges based on all the

237. Hall, *supra* note 204, at 412–13.

238. ICC Statute, *supra* note 1, art. 17(1)(c) (providing that cases are inadmissible when a second trial was prohibited under article 20(3), except when the first was designed to shield the person or was not independent or impartial).

grounds listed in article 17 might delay and obstruct the Court from carrying out its duties effectively.

The Statute is unclear as to the meaning of the phrase “may be challenged only once.”²³⁹ Must challenges to admissibility and jurisdiction be brought at once, meaning together at the same proceeding? Or must admissibility and jurisdiction be challenged in separate proceedings, but only one time?²⁴⁰ Carden and Sadat drew two conclusions. First, it would seem necessary to require parties to bring their admissibility challenge at the same time as their jurisdictional challenge, except on grounds of *ne bis in idem*, although it might be necessary to permit jurisdictional challenges subsequent to the bringing of admissibility challenges, since the former go to the Court’s power over the case. Second, if several States have the right to bring a challenge and one of those States proceeds to challenge the jurisdiction of the Court or the admissibility of the case, the remaining States should not be permitted to bring additional challenges except on different grounds.²⁴¹

However, the Rules of Procedure and Evidence seem to give the competent chamber flexibility to organize the procedure. Rule 58(2) provides that the chamber “shall decide on the procedure to be followed” and “may take appropriate measures for the proper conduct of the proceedings. [It] may join the challenge or question to a confirmation or a trial proceedings as long as this does not cause undue delay.”²⁴² Although sub-rule 2 is not very clear on the procedure, it is clear that it leaves the question of a joinder of challenges to the discretion of the Court.²⁴³

If a State made a challenge,²⁴⁴ then the Prosecutor must suspend the investigation until the Court makes its determination in accordance with article 17.²⁴⁵ But, must the Prosecutor suspend the investigation if either type of challenge is brought? In this regard, Professor Hall argues that

239. ICC Statute, *supra* note 1, art. 19(4).

240. See Newton, *supra* note 121, at 57 (expressing that “[t]he text is vague as to whether this means one appeal as to jurisdiction with an additional appeal regarding admissibility, or whether both grounds for removing the case from the ICC authority should be combined in one appeal”). The author’s reference to the word “appeal” in this context meant challenge.

241. Sadat & Carden, *supra* note 134, at 420.

242. ICC Rules, *supra* note 173, rule 58(2).

243. For a valuable discussion concerning the problem of joinder, see Lindenmann, *supra* note 173, at 177.

244. In this context, a State covered by paragraphs 2(b) and (c). ICC Statute, *supra* note 1, art. 19(2)(b)-(c).

245. *Id.* art. 19(7); Bergsmo, *supra* note 130, at 361–62; see also Bassiouni, *supra* note 200, at 20.

since article 19(7) makes reference to article 17²⁴⁶ and since the latter addresses only admissibility, not jurisdiction, therefore, a challenge limited to jurisdiction would not require the Prosecutor to suspend the investigation. Any other construction would mean that the Prosecutor would have to suspend the investigation forever, since the Court would not be considering the question of admissibility, unless it did so on its own motion.²⁴⁷

Pending the ruling on admissibility, the Prosecutor may seek authority to continue the investigation from the Court: if it is necessary to preserve important evidence and the risk of destruction is high,²⁴⁸ to complete a previously begun witness statement; or to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest.²⁴⁹

Although article 19(8) expressly authorizes the Prosecutor to seek these three specified measures, the Prosecutor may have an inherent right to seek authority from the Court to take additional measures. The additional measures are necessary to preserve the Court's jurisdiction and its ability to render a fair decision. Accordingly, nothing in article 19(8) limits the power of the Prosecutor under article 56(1) to inform the Pre-Trial Chamber whenever she or he "considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial."²⁵⁰

The types of steps identified in article 18(6) are similar to those listed in article 56(1), but are not identical. Thus, they should be seen as an independent basis for the Prosecutor—as opposed to the Pre-Trial Chamber—to act. Furthermore, since article 19(8)(a) speaks of "investigative steps of the kind referred to in article 18, paragraph 6" rather than

246. "If a challenge is made by a State referred to in paragraph 2(b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17." ICC Statute, *supra* note 1, art. 19(7).

247. Hall, *supra* note 204, at 414. It should be noted that challenges by the individual concerned do not require a Prosecutor to suspend an investigation. This is clear from the text of paragraph 7, which restricts the suspension of an investigation to "... a State referred to in paragraph 2(b) or (c)." ICC Statute, *supra* note 1, art. 19(7).

248. ICC Statute, *supra* note 1, arts. 18(6), 19(8)(a). Paragraph (a) of article 19(8) should be read through the scope of article 18(6), since the latter identifies those "necessary investigative steps" to be taken as mentioned above.

249. *Id.* art. 19(8); ICC Rules, *supra* note 173, rule 61; *see also* Bassiouni, *supra* note 200, at 20. In this context, the authority granted to the Prosecutor would be limited to persons for whom an "arrest warrant" has been requested under article 58(1) and does not cover persons for whom the Prosecutor requests only a "summons" to appear. The latter suggests that the Prosecutor will, as a precautionary measure, often request arrest warrants, ensuring that he or she can take effective measures during a suspension of investigation if that person absconds.

250. ICC Statute, *supra* note 1, art. 56(1)(a); *see also* Hall, *supra* note 204, at 415.

“the investigative steps” referred to in article 19(8), the steps identified in article 19(8) should be seen as broader than those in article 18(6). This broad language, together with the powers identified in article 19(8)(b) and (c), suggests that the Prosecutor could be authorized to use most of the powers he or she would have under article 54 and other articles to continue the investigation. This makes sense, because at this very critical stage, the possibility that a State will act in bad faith in order to destroy the evidence increases. This language was introduced to avoid the possibility of a case not being investigated and prosecuted, even though the Court rules that a case is admissible, because the evidence has been destroyed or hidden.

If the Court deems a case inadmissible, the Prosecutor may appeal to the Appeals Chamber²⁵¹ or seek review by the Court, if new facts or evidence arise.²⁵² Neither the challenge of the State concerned nor the appeal or the Prosecutor’s new request for a review of the decision will affect the validity of any “act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge,” but not prior to the request for review.²⁵³

Article 19(10) imposes three requirements on the Prosecutor before she or he may ask the Court to review its decision. It first requires that

251. *Id.* art. 19(6). The decision of the Trial Chamber or the Pre-Trial Chamber may be appealed in accordance with article 82(1)(a). *See* ICC Rules, *supra* note 174, rules 150(3)-(4), 154(1), (3). Rule 150 stipulates:

- 1) Subject to sub-rule 2, an appeal against a decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75 may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision, the sentence or the reparation order;
- 2) The Appeals Chamber may extend the time limit set out in sub-rule 1, for good cause, upon the application of the party seeking to file the appeal;
- 3) The appeal shall be filed with the registrar;
- 4) If an appeal is not filed as set out in sub-rules 1 to 3, the decision, the sentence or the reparation order of the Trial Chamber shall become final.

Rule 154 stipulates:

- 1) An appeal may be filed under article 81, paragraph 3(c)(ii), or article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision
- 3) Rule 150, sub-rules 3 and 4, shall apply to appeals filed under sub-rules 1 and 2 of this rule.

252. ICC Statute, *supra* note 1, art. 19(10); *see also* ICC Rules, *supra* note 174, rule 62 (providing that the Prosecutor should make his or her request before the chamber which made the latest ruling on admissibility). Furthermore, sub-rule 2 grants the State or States, which challenged the admissibility under article 19(2) to make representations and to be notified of the request of the Prosecutor. *Id.* rule 62(2).

253. Obviously, a request submitted by the Prosecutor for a review should not affect any act taken by the Prosecutor prior to the challenge of the State concerned.

“new facts have arisen.” This phrase includes new facts that have occurred since the decision.²⁵⁴ However, it also includes facts in existence at the time of the decision, but not discovered by the Prosecutor until after the decision was reached. Another requirement is that these facts must “negate the basis on which the case had been previously found inadmissible.” This appears to be a highly objective criterion left to the Court’s assessment. Finally, the Prosecutor must be “fully satisfied” that the other two requirements have been met. This requirement is a very subjective test, which the Prosecutor can apply with wide discretion.

In the absence of paragraph 10, the Prosecutor would have been able to seek a new ruling on the question of admissibility pursuant to paragraph 3. There is no express provision in paragraph 10 allowing the Prosecutor to seek review of a determination that there was no jurisdiction in a case. Therefore, in the event that new information was discovered after such a determination, the Prosecutor should be able to seek a new ruling on the question of jurisdiction pursuant to paragraph 3, which does not restrict the time or number of such requests. Without this provision, States which concealed evidence could frustrate the Court’s exercise of jurisdiction.²⁵⁵

Finally, article 19(10) is not clear whether such a request for review is an extra right granted to the Prosecutor in addition to the right to an appeal under paragraph 6. If the answer is yes, when can the Prosecutor exercise this right prior to or subsequent to the appeal? Moreover, the first sentence of paragraph 10 reads: “If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision.” The text is silent as to whether this decision is the outcome of proceedings before the Pre-Trial Chamber or Trial Chamber or the Appeals Chamber. These questions are not answered in the Statute or even in the Rules of Procedure and Evidence.

If this decision were the outcome of proceedings of the Appeals Chamber, the conclusion would be different than if it were the outcome of proceedings of the Pre-Trial Chamber or the Trial Chamber. Arguably, the right for a review should not be mixed with the right for appeal, since the Appeals Chamber is not authorized to rule on situations where “new facts have arisen.”²⁵⁶ Accordingly, if the Pre-Trial Chamber or the Trial Chamber decided that “a case is inadmissible under article 17,” the Prosecutor could appeal this decision. If, pending a ruling by the Appeals Chamber, “new facts . . . arise which negate the basis on which the

254. This interpretation would be consistent with the approach taken with respect to reviews of convictions and sentences under article 84(1). ICC Statute, *supra* note 1, art. 84(1).

255. See generally Hall, *supra* note 204, at 417.

256. Interview with William Schabas, *supra* note 221.

case had previously been found inadmissible under article 17," the Prosecutor then submits a request for a review of the decision "to the Chamber that made the latest ruling on admissibility." Thus, the Prosecutor could submit a request for review, even while the appeal is pending, since the appeal and the request for review are two separate and independent procedures.²⁵⁷ Inevitably, in this situation, the Prosecutor could also submit a request for review subsequent to a decision by the Appeals Chamber, if new facts have arisen.

The practical application of the latter example would contradict the view, namely, that the Appeals Chamber should not rule on situations where new facts have arisen. According to rule 62(1), "if the Prosecutor makes a request under article 19, paragraph 10, he or she shall make the request to the Chamber that made the latest ruling on admissibility." Thus, it could be argued that rule 62(1) suggests that it is possible that the Appeals Chamber should not rule on a request based on the emergence of new facts. Inevitably, this leads to confusion. Professor William Schabas argues that this interpretation prevails. He predicts that the Court will follow the common law approach, and thus the Appeals Chamber will be precluded from ruling on situations such as that mentioned under paragraph 10. He further assumes that the wording of rule 62(1) obviously targets the Pre-Trial Chamber or the Trial Chamber as opposed to the Appeals Chamber.²⁵⁸

Nevertheless, one might suggest that the appropriate construction of these procedures will depend on the type of jurisprudence, common law or continental law, which will be adopted by the Court once it starts functioning. In other words, according to Professor Schabas's interpretation, it is assumed that the Court would follow the common law approach, which denies the Appeals Chamber the right to rule on situations where new facts have arisen. According to another interpretation, it is assumed that the Court would follow the continental law approach, which provides the Appeals Chamber with a wider discretion in this regard. Thus, the latter could deal with the entire situation. Consequently, the mechanism to be followed in the interpretation of the Statute will depend on the type of legal system—continental or common law—that will be followed.

257. According to Professor Schabas, if the Court has decided that a case is inadmissible in accordance with article 19(10), the Prosecutor could file an appeal, and if the following day new facts have arisen in accordance with paragraph 10, he or she could request a review. *Id.* According to rule 62, a request for a review of the decision should be submitted "to the Chamber that made the latest ruling on admissibility." ICC Rules, *supra* note 173, rule 62. Thus, the request could be made to the Trial Chamber which ruled on the first decision or the Appeals Chamber if at the time the request was submitted, it has decided on the appeal.

258. Interview with William Schabas, *supra* note 221.

If the Prosecutor follows the criteria in article 17 and decides that the case is inadmissible, she or he may defer the investigation to the State with jurisdiction. According to article 19(11), the Prosecutor may request “information on the proceedings” from the relevant State. Hall argues that the scope of information that can be requested under paragraph 11 appears to be broader than the information, which can be requested under article 18(5). Under article 18(5), the Prosecutor can request information concerning “the progress of the State’s investigations and any subsequent prosecutions.”²⁵⁹ However, under article 19(11) the Prosecutor would be seeking information concerning an individual case rather than a situation. It can be argued that, although it is true that the information requested at this stage concerns an individual case rather than a situation—and this makes the circumstances more critical—nevertheless this does not necessarily support the conclusion that article 19(11) is broader than article 18(5) because the scope and amount of information varies from one case to another. Moreover, it could happen that the scope of information required with regard to a situation might be greater than the scope of information regarding an individual case.

Furthermore, a literal reading of the wording of both paragraphs, suggests that the content of article 18(5) is broader than that of article 19(11). Article 18(5) permits the Prosecutor who has deferred an investigation to request the State concerned to “periodically inform” on “the progress of its investigations and any subsequent prosecutions.” Under article 19(11), the Prosecutor may ask the State concerned to “make available . . . information on the proceedings.” Thus, the strict language of paragraph 5, which reflects the obligation of the State concerned to inform the Prosecutor periodically, suggests that article 19(11) is not broader than article 18(5). In addition, paragraph 5 imposes a duty upon State parties to respond to such “requests without undue delay,” while paragraph 11 lacks this obligation.

Those arguing that article 19(11) is broader than article 18(5) do not believe that the lack of a requirement to act without undue delay is decisive to this interpretation. They point out that the State Party required to respond to the Prosecutor’s request is already under the obligation to act without delay. Article 86 of the ICC Statute places this duty upon all States Party to the ICC. However, the strict requirements of paragraph 5, place an obligation on the State in question to inform the Prosecutor periodically of the status of the State’s actions.²⁶⁰

259. Hall, *supra* note 204, at 418.

260. Newton, *supra* note 121, at 58, 59; *see also* ICC Statute, *supra* note 1, art. 86 (stipulating “States Parties shall, in accordance with the provisions of this Statute, co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”).

The Prosecutor, at the request of the investigating State, has a duty to keep confidential the information collected. This is done so that the State's investigation is not undermined by the release of sensitive information, such as sealed indictments. Moreover, the Prosecutor has a duty to inform the investigating State if she or he resumes the investigation. Paragraph 11, unlike article 18(3), lacks requirements or guidelines that the Prosecutor must follow when proceeding with an investigation after she or he has deferred the investigation to a State in accordance with paragraph 11. In this respect only, one could suggest that paragraph 11 is wide enough to cover all possible situations, including that of article 18(3), in order to assist the Prosecutor to pursue the investigation, if the situation thereafter so required. The language in 19(11), "if the Prosecutor thereafter decides to proceed with an investigation," reflects a wide discretionary power to intervene at any time according to his or her assessment.²⁶¹

The provisions of articles 18 and 19 reflect the severe tension between the powers of the Prosecutor, and the priority of States in the complementarity regime. The text of article 19(4) fortifies the latter feature, while the text of paragraphs 8, 9, 10, and 11 reinforce the former. Although giving States multiple chances to assert jurisdiction over cases through some of the provisions of articles 18 and 19 strengthens the first feature of complementarity (State primacy) other portions of the same articles favor the Court and the second feature of complementarity (the Court's supremacy). Once the Court comes into operation, these conflicting provisions that reflect the tension between the two features of complementarity will be resolved either in favor of the Court or in favor of States. If the latter prevails, one could emphasize that the idea behind creating a Court based on the notion of complementarity has succeeded. In the case of the former, it could be accentuated that the ICC has succeeded in becoming a supranational institution provided with implied primacy, which, although not reflected in its Statute, is reflected in its practices.

III. THE *Ne bis in idem* PRINCIPLE

The principle of *ne bis in idem* is a corollary of the principle of complementarity reflected in article 17, which likewise prevents the Court from asserting jurisdiction when a competent national legal sys-

261. It is argued that paragraph 11 appears to address a voluntary deferral by the Prosecutor of an investigation based on an assessment that the factors listed in article 17 exist, rather than a deferral pursuant to article 18(2) or a suspension of an investigation pursuant to article 19(7) after an admissibility challenge.

tem has already accepted jurisdiction.²⁶² While article 17 covers investigations and prosecutions, article 20, covers cases that have already been tried. Article 20(3) sets out the standards for assessing whether a domestic adjudication of a case makes it inadmissible before the ICC.

The discussions over the principle of *ne bis in idem* in Rome came in the wake of the hard fought compromises on the complementarity provisions related to national investigations or ongoing prosecutions. In contrast to the parallel “unwilling or unable genuinely” standards applicable to investigations or ongoing prosecutions by States, the provisions of completed trials only amplify the “unwilling” criterion. The appropriate domestic courts were obviously able to handle a trial that was in fact completed. The *ne bis in idem* standards applicable to domestic trials focus on domestic systems that have used the façade of legal proceedings to frustrate the ends of justice.²⁶³

When a domestic justice system has already tried a case, the complementarity mechanism, reflected in the *ne bis in idem* article, points to a test of whether the national trial proceedings were legitimate. Thus, the judgment bars a prosecution by the Court except in the case of sham proceedings.²⁶⁴ These are defined as trials held

- (a) . . . for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially . . . and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.²⁶⁵

This test may appear simple, but applying the criteria of this test in light of article 20(3) is extremely complex.

262. Bassiouni, *supra* note 200, at 20.

263. Newton, *supra* note 121, at 58–59. For a detailed discussion regarding the concept and application of the principle of *ne bis in idem*, see Mohamed El Zeidy, *The Doctrine of Double Jeopardy in International Criminal & Human Rights Law*, 6 MEDITERRANEAN J. HUM. RTS. 183 (2002).

264. SCHABAS, *supra* note 125, at 69.

265. ICC Statute, *supra* note 1, art. 20(3). Two examples cover paragraph 3. The first example occurs when a State charges a perpetrator of genocide with assault. Such a trial, although respecting all the safeguards concerning impartiality, would be aimed at shielding the person from responsibility for an extremely serious crime. The second example occurs in a broader spectrum of situations. It does not mean, however, that the ICC will have the power to intervene in every case where it judges that a procedural safeguard was violated in a trial conducted by a national authority. In order for the ICC to begin a new trial, the violation of procedural safeguards must have been committed with the aim of preventing the person concerned from being brought to justice. DANIEL PREFONTAINE ET AL., *INTERNATIONAL CRIMINAL COURT: MANUAL FOR THE RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE* 85–86 (2000).

Paragraph 3, which is the most complicated and controversial part of article 20, reflects the entire array of procedural and substantive provisions relevant for implementing complementarity. Thus, an individual, who has been tried by a national court for conduct “also proscribed under article 6, 7, or 8” shall not “be tried by the Court with respect to the same conduct.” The inclusion of this language was the outcome of compromises among different proposals submitted during the drafting process.²⁶⁶ At the 1998 PrepCom, a proposal was submitted, which substituted the following language: “A person who has been tried by another court for conduct constituting a crime referred to in article 5.”²⁶⁷ This proposal was rejected on the ground that a conduct could constitute a crime only if a court has determined that the conduct is a crime. This would not be logical in the case of an acquittal. The Chairman proposed reintroducing the language of the ILC Draft Statute, “acts constituting a crime of the kind referred to in Article 42(2)” but it was also rejected.²⁶⁸ Even the reference to the word “offence” was not adopted. Consequently, the compromise proposal, “conduct also proscribed,” was adopted. However, the latter term seems to be unclear and might lead to different interpretations in practice.

According to Immi Tallgren, this phrase should be understood broadly. Thus, if a national trial of the conduct has taken place for the conduct falling under the ICC’s jurisdiction, the ICC shall not try the person again for that conduct. The categorization used in the national trial—that is, whether it relied on definitions of international crimes or crimes under national law (for example, murder of several persons)—is basically not relevant.²⁶⁹ Nevertheless, the text of paragraph 3 is not easy to understand. There are at least two possible interpretations of paragraph 3, which would result in different outcomes when applied.

266. While several proposals were made to change the article on *ne bis in idem* at the Rome Conference, only two amendments were eventually included in the final package following bilateral consultations conducted by the coordinator. The first change made was a technical one, in the chapeau of paragraph 3, with the phrase “with respect to the same conduct.” The addition clarified that the Court could try someone even if that person had already been tried in a national court, as long as different conduct was the subject of the second prosecution. The second change added the same phrase as appears in the article regarding admissibility to make the criteria more objective—namely, the phrase “in accordance with the norms of due process recognized by international law.” Since this phrase had been accepted for admissibility, it was believed that it should be made applicable for *ne bis in idem*. Holmes, *supra* note 86, at 59.

267. Immi Tallgren, *Article 20: Ne bis in idem*, in COMMENTARY ON THE ROME STATUTE, *supra* note 25, at 419, 430.

268. *Id.*; see also Holmes, *supra* note 86, at 56–57. For a thorough discussion on the negotiating history, see generally, *id.* at 56–60.

269. Tallgren, *supra* note 267, at 431.

First, the chapeau of paragraph 3 stipulates that “[n]o person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct.” Let us take article 7 as an example. According to the first interpretation the chapeau refers to any of the acts listed under article 7. If any of those acts were committed by a person, who has already been tried once in a domestic jurisdiction, the ICC is barred from trying that person again for the same act or conduct.²⁷⁰ For example, article 7(1)(a) refers to murder. Thus, according to this construction, if the national court tried the person for the conduct also proscribed under article 7, here murder, the ICC is barred from trying him, even though the murder was considered an ordinary crime.

According to a second construction, based on the same example, the phrase “conduct also proscribed under article 6, 7 or 8” is the key to the interpretation. Thus in order to become conduct proscribed under articles 6, 7, or 8, such conduct or act should meet the specific requirements listed in those articles. Looking again at article 7(a), the murder must be “part of a wide spread or systematic attack directed against any civilian population, with knowledge of the attack.”²⁷¹ Hence, according to this construction, one may conclude that the drafters intended to refer to crimes against humanity, and not to murder as an ordinary crime. Thus, according to this interpretation, the ICC is therefore barred from trying the person who has previously been tried by a competent national court for a crime against humanity. However, if this is the appropriate interpretation then why did the drafters not make reference to the term used in paragraph 2: “for a crime referred to in article 5”?²⁷²

This is unclear and confusing.²⁷³ To counter the argument above, one could argue that the difference of formulation between paragraphs 2 and 3 in this respect suggests that the drafters could not have made reference to the term “for a crime referred to in article 5” in paragraph 3, since the crime of aggression in article 5(1)(d) is not defined yet. Furthermore, the drafters intended for paragraph 3 to have the same meaning and purpose as paragraph 2, namely, the crimes set out in article 5. However, they wanted to widen the interpretation of paragraph 3 to cover the specific

270. According to Bassiouni, the term “same conduct” means: a) identical acts; b) a series of acts related to each other by the scheme or intent of the actor; or c) multiple acts committed at more than one place and at different times, but related by the actor’s criminal design. BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 223, at 602.

271. ICC Statute, *supra* note 1, art. 7(1).

272. *Id.* art. 7(2).

273. Even the Rules of Procedure and Evidence are silent with regard to article 20. The only rule that exists is rule 168, which deals with *ne bis in idem*, albeit in the different context of article 70 (offences against the administration of justice). ICC Rules, *supra* note 173, rule 168.

acts listed under articles 6, 7, and 8 by using the term “conduct.” It was not therefore possible to identify the acts of aggression because they were not defined yet. There is another reason the drafters did not make reference to the phrase “a crime referred to in article 5” in paragraph 3. The drafters intended to make reference to the list of acts set out in articles 6, 7 and 8, in order to limit the subjectivity of the Prosecutor’s assessment of whether the crime in question, which was subject to a previous trial by a national court, lies within the Court’s jurisdiction.²⁷⁴

Professor William Schabas reaches a similar interpretation. He asserts that there

is some doubt about the application of complementarity and the *ne bis in idem* principle to situations where an individual has already been tried by a national justice system, but for a crime under ordinary criminal law such as murder, rather than for the truly international offences of genocide, crimes against humanity and war crimes. It will be argued that trial for an underlying offence tends to trivialize the crime and contribute to revisionism or negationism. Many who violate human rights may be willing to accept the fact that they have committed murder or assault, but will refuse to admit the more grievous crimes of genocide or crimes against humanity. Yet murder is a very serious crime in all justice systems and is generally sanctioned by the most severe penalties. Article 20(3) seems to suggest this, when it declares that such subsequent proceedings before the International Criminal Court when there has already been a trial “for conduct also proscribed under Articles 6, 7 and 8” is prohibited. In the alternative, the Statute ought to have said, “for a crime referred to in Article 5”, as it does in Article 20(2).²⁷⁵

Nevertheless, the second argument is the appropriate one because it reflects the main purpose of the ICC, that of trying persons committing crimes within its jurisdiction if national courts fail to do so. Reading article 20(3)(a) in conjunction with article 22(1) further supports this conclusion. Article 20(3)(a) refers to crimes within the jurisdiction of the Court. Accordingly, the ICC Statute grants the Court jurisdiction only over the four crimes listed under article 5, and not over ordinary crimes.

274. For example, under article 5, the Prosecutor could argue that the crime which was the subject of a previous trial before the national court is not a crime against humanity, and, as a result, the person should be tried before the ICC. In a case using the term “conduct proscribed under article 6, 7 or 8,” however, the situation would be different because every act that might build or create a crime against humanity would be identified. Thus, the Prosecutor would not enjoy the broad subjective criterion in his assessment.

275. SCHABAS, *supra* note 125, at 70.

Article 22(1) also stipulates: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Because articles 5 and 7 of the Statute do not cover murder as an ordinary crime, the Court would not be empowered to exercise its jurisdiction over such a crime.

It seems that paragraph 3 was formulated in such a complex way because States vigorously defended their rights under complementarity. Although there is some doubt that the drafters intended this complexity; nevertheless, the final package reflected it.

It should be noted, however, that paragraph 3 gives rise to other problems of interpretation. The Court is barred from trying any person who has been tried by a national court with respect to the same conduct "unless the proceedings in the other court" were a sham and meet the requirements of subparagraphs (a) and/or (b).²⁷⁶ What is meant by the term "proceedings" in this context? Is it the proceedings of only the trial stage? Or does the term reflect the early intention of the drafters when they were preparing what eventually became article 17, that the term "proceedings" should mean the process of investigation and prosecution.²⁷⁷ The text is vague and the Rules of Procedure and Evidence are silent in this respect.²⁷⁸

Let us apply the term according to both ways of interpretation in order to observe the different conclusions. If the term "proceedings" is to be construed as limited to the trial stage only, then any procedural aspect of the trial which affects its outcome negatively, could allow the ICC to intervene and try the accused subsequent to his trial in a national court. The practical implementation of this article presents a serious problem. For example, the trial stage proceedings could have been perfect, but the investigation or the prosecution was not conducted independently or impartially, or was done for the purpose of shielding the person concerned. What would be the situation if this were not discovered until the trial before the domestic court was completed? In other words, there could be a situation where the investigation or prosecution stages were not conducted properly, the trial proceedings were conducted in *bona fide*

276. ICC Statute, *supra* note 1, art. 20(3)(a),(b).

277. *Report of the Inter-Sessional Meeting in Zutphen*, *supra* note 115, at 43.

278. The problem is that no specific rules were proposed, and none were adopted for a number of articles in part 2, including the crimes within the jurisdiction of the Court as they were considered extensively in the context of the elaboration of the "Elements of Crime." ICC Statute, *supra* note 1, arts. 5–10, 16, 20, 21. For a general valuable discussion concerning the drafting history of the Rules of Procedure and Evidence regarding jurisdiction and admissibility, see generally John T. Holmes, *Jurisdiction and Admissibility*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 321–48 (Roy S. Lee et al. eds., 2001).

manner, but the outcome of the trial would not be just since it would be based on false evidence. According to the above construction of the term "proceedings," in this situation the Court would be barred from trying that person, since "proceedings" does not cover the investigation or the entire prosecution, but only the trial stage. However, one could argue that the Prosecutor has other options available at this point. Under article 19(10), if the Court has earlier found the case to be inadmissible, the Prosecutor may seek a review based on the new facts, which "negate the basis on which the case had previously been found inadmissible."²⁷⁹ The new facts could be facts not previously discovered, or they could be facts exposing the investigation and prosecution as a sham. Hence, the Court may have another chance to try that person. The State concerned also has a chance to defend itself and "shall be given a time limit within which to make representation."²⁸⁰ In its defense the State could argue, based on article 20(3), that the person has been already tried before its courts and the trial proceedings were *bona fide*, according to the strict construction of the term. Therefore the ICC would be barred from retrying that person despite the sham investigation or prosecution.²⁸¹

This outcome is far from hypothetical. Still, this situation might not always convince the Court. The Court may rely on the general rule, which says that what is based on falsehood must be void, and extend the word proceeding to cover sham investigations or prosecutions. Thus, since the evidence submitted to the national court was the outcome of improper investigation and prosecution, therefore, the trial is void. Moreover, the Court could also argue that if it followed this strict construction, there would be a great risk of hindering and defeating the main purpose of the ICC. It seems that the theoretical application of the Statute and its practical application will be different.

On the other hand, if the term "proceedings" were to be construed within the same frame and meaning of article 17, i.e., investigation and

279. ICC Statute, *supra* note 1, art. 19(10).

280. ICC Rules, *supra* note 173, rule 62(2).

281. *Id.* rule 181. Although article 19 seems to limit to the accused the right of bringing a challenge based on *ne bis in idem*, rule 181, on the other hand appears to leave room for the State concerned to act in favor of the accused in this respect. Rule 181 stipulates:

When a situation described in article 89, paragraph 2, arises, and without prejudice to the provisions of article 19 and of rules 58 to 62 on procedures applicable to challenges to the jurisdiction of the Court or the admissibility of a case, the Chamber dealing with the case, if the admissibility ruling is still pending, shall take steps to obtain from the requested State all the relevant information about the *ne bis in idem* challenge brought by the person.

Id. However, since rule 181 is concerned with pending admissibility challenges, one might wonder whether the rule covers situations where the Court decided that a case is inadmissible, and the Prosecutor requested a review based on new facts.

prosecution, the conclusion would be different. A literal reading of the chapeau of article 20(3) suggests that the term "proceedings" according to this construction, would not fit with the rest of this paragraph because of the phrase "in the other court." Thus, it is hardly imaginable that the paragraph refers only to investigation or prosecutions as the phrase "in the other court" seems to emphasize that what is in fact meant by "proceedings" is the procedures taken during the trial. Nevertheless, from an analytical standpoint and according to the main purpose of the ICC one could suggest that the practical construction of the term "proceedings" should take into account the situation as a whole. Thus, the Court might examine the genuineness of the investigation, of the prosecution, and of the trial. Any other construction might lead to a complete blocking of the Court's jurisdiction. It seems that the drafters of paragraph 3 intended a very strong first feature of the complementarity regime, favoring national sovereignty. Its formulation and the different scopes of its interpretation suggest this. The gaps resulting from the different interpretations empower States to build strong arguments that might lead the Court to determine that a case is inadmissible.

Finally, there is another problem that might lead to misinterpretation. Paragraph 3 is silent with respect to whether the national court should reach a decision. If it must, what kind of decision is required? Is a verdict needed, or does it refer to a decision reached before then; for example, to dismiss because of insufficient evidence? Is the decision of the court of first instance sufficient? Or should the decision be final, that is, not appealable? These questions are not clearly answered in the Statute, or in the Rules of Procedure and Evidence.

According to Immi Tallgren, a "[n]ational decision not to proceed because of insufficient evidence or because prosecution would not serve the interest of justice would suffice. A national decision, not amounting to a conviction or acquittal, must be subject to the same criteria, the negligence of which lead to the application of the exception."²⁸² In a common law jurisdiction, the decision to dismiss could be made during the trial stage by either the judge or the prosecutor (with the judge's consent). In a continental law jurisdiction (e.g., France or Egypt) this decision could not happen during the trial because neither the prosecutor nor the judge is authorized to dismiss a case during the trial stage. The prosecutor can only dismiss the case after his or her prosecution and prior to the trial stage,²⁸³ while the only possibility for the judge is to render a decision on the merits,

282. Tallgren, *supra* note 267, at 431.

283. This is the case in Egypt. In felony cases, I, as the prosecutor, have the authority to dismiss a case until I submit the indictment to the court. Once the case is in the court's possession, I cannot take that kind of action. Once in the court's possession, it must rule on the case and issue a ruling of acquittal or conviction, but it cannot dismiss it for insufficient evidence.

either an acquittal or a conviction. It is uncertain whether the ICC will follow the continental or the common law approach, since the Statute is a combination of both.

In this situation the answer is simple. The Court should apply both systems depending on what jurisdiction the case comes from. In other words, if the Court is dealing with a case from a common law jurisdiction, then it will follow the common law approach. If the case originates in a State with continental law, the Court should apply the continental law procedure. If the Court followed the common law approach, then the aforementioned construction would seem to run counter to the wording of the chapeau of paragraph 3, since the latter speaks about completed trials: "No person who has been tried by another court. . . ." However, one might counter that if what is meant is a decision amounting to an acquittal or conviction, then why is paragraph 3 formulated differently than paragraph 2, which requires the person "has already been convicted or acquitted by the Court"? Could a completed trial be named so, without a court reaching a decision to acquit or convict?

Professor Bassiouni seems to suggest an answer to this question. He uses a different construction than the one previously mentioned. He argues that "[a]n individual, who has been either previously acquitted or convicted by a national court for conduct that formed the basis of crimes under the Statute, may not be prosecuted by the Court," unless the proceedings met the requirements of article 20(3)(a) and/or (b).²⁸⁴ It seems that he ignored the previously mentioned possibility that might arise from applying the common law approach.²⁸⁵ His current interpretation is appropriate, but only when dealing with continental law cases.

Moreover must a national court's decision—either an acquittal or a conviction—be a final one?²⁸⁶ Although this seems vague according to Bassiouni's construction there are at least two answers based on two different legal arguments. First, it might be suggested that the outcome of the national court should be final. This argument looks at article 20(1)

284. *Id.* According to Bassiouni's argument, a decision must be either an acquittal or a conviction.

285. However, Bassiouni's argument could work when applying the common law approach if a dismissal is considered to be the equivalent of an acquittal.

286. See, e.g., *Report of the Inter-Sessional Meeting in Zutphen*, *supra* note 115, at 47. In the proposal, the drafters made reference to final decisions rendered from national courts as follows:

Any person(s) mentioned in the submission to the Court have already been acquitted or convicted by a final rule in a State for the acts involved unless the decision failed to take account of all facts contained in the submission or the proceedings were conducted in the State concerned by evading the rule of international law for the manifest purpose of revealing the persons concerned of criminal responsibility.

Id.

and (2), which anticipated final decisions. It presumes that the drafters had the same intent, evidenced in earlier proposals,²⁸⁷ about the entire article, notwithstanding the fact that the finality in paragraphs 1 and 2 refers to the ICC's outcomes.

A second answer holds that in the case where a decision is the outcome of a national court, it is not necessary to reach a final judgment. There could be situations where the Court demands to intervene and waiting for a final decision prevents the Court from acting expeditiously.²⁸⁸ However, it could be argued that norms of due process require finality, since this would be a guarantee in favor of the accused.

In conclusion, article 20(3) seems to set standards preserving the right of States to complementarity notwithstanding the obstacles that might arise when paragraph 3 and its different possible interpretations will be implemented. However, one might suggest, as mentioned previously, that the Court's interpretation of the article should consider the type of legal system with which it is dealing. Thus, paragraph 3 could be understood in two different ways depending on the legal system from

287. "As regards article 42, the remark was made that the principle of *non bis in idem* ... should apply only to *res judicata* and not to proceedings discontinued for technical reasons." 1996 PrepCom Report, Vol. 1, *supra* note 87, ¶ 170; see also Report of the Inter-Sessional Meeting in Zutphen, *supra* note 115 (drafters' proposal).

288. In this situation, the Prosecutor would act either according to article 19(3) or (10), and in both situations, the Court will hold a hearing to determine the admissibility of the case concerned. However, the problem lies within the aforementioned constructions concerning finality. If the requirement is that the national decision should be final, then the Court might face the problem of ruling on the admissibility of the case, since the person concerned might argue that he or she has not been tried except before the court of first instance. Article 89(2) permits the person arrested to bring a challenge before the national court on the basis of *ne bis in idem*. ICC Statute, *supra* note 1, art. 89(2). The national court does not, however, have the power to rule upon this. In fact, the Statute requires the requested State to immediately consult the Court in order to determine whether or not it has already ruled thereon. If the Court has decided that the case is admissible, the State must proceed with the execution of the request, or in other words, surrender of the person in question. If, however, an admissibility ruling is pending before the Court, the requested State may postpone surrender. Accordingly, the ICC would be coerced to postpone its ruling until the judgment in the national court is final, and the State may postpone his or her surrender of the person until that time (this is very risky, since the person could flee). Thus, the whole situation is very dangerous, despite the authority of the Prosecutor to act in accordance with article 19(8) to preserve evidence.

It should be noted, however, that article 89(2) does not grant the requested State the right to raise the *ne bis in idem* plea before the Court. Although this seems strange, article 19(2)(b) suggests the same conclusion, as it limits the challenge to the admissibility of a case to pending investigations and prosecutions or completed investigations and prosecutions. Thus, trials are excluded.

On the other hand, if a decision of first instance is sufficient, this might solve the former problem, but might run counter to the accused's rights regarding the judicial guarantees or norms of due process. For a thorough discussion concerning *ne bis in idem* and surrender, see Dino Rinoldi et al., *International Co-operation and Judicial Assistance between the International Criminal Court and States Parties*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, at 348–51.

where a case originates. This seems to be the most appropriate construction.

On the other hand, the Prosecutor will face a very hard test in interpreting and assessing the requirements of paragraph 3, especially those of subparagraph (b). It places the burden of proof on the Prosecutor to determine that the proceedings "were not conducted independently or impartially . . . and were conducted in a manner which, in the circumstance, was inconsistent with an intent to bring the person concerned to justice."²⁸⁹

IV. THE PRINCIPLE OF COMPLEMENTARITY AND THE PROBLEM OF AMNESTIES AND PARDONS

An unresolved but controversial issue related to jurisdiction and admissibility is the question of amnesties and pardons that States from time to time grant to perpetrators of the crimes within the Court's mandate.²⁹⁰ Does the grant of an amnesty or pardon to an accused person appearing before the ICC render a case inadmissible? While no specific language in the ICC Statute deals with amnesties and pardons, they could be dealt with by applying the complementarity provisions.

A possible answer to the above question argues that for a case to be inadmissible, it ought, at least, to have been investigated. Thus, the granting of blanket amnesties to persons who are otherwise amenable to ICC jurisdiction without a prior investigation and careful delving into the merits of their case is *prima facie* evidence of unwillingness or inability of the State concerned to prosecute.²⁹¹ While this first construction makes sense, a careful perusal of the Statute and a strict interpretation might suggest the opposite and lead to a different conclusion.

289. ICC Statute, *supra* note 1, art. 20(3)(b).

290. For a good discussion regarding the technical differences between the two terms "amnesty" and "pardon," see Luc Huyse, *To Punish or To Pardon: A Devil's Choice*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17–21 SEPTEMBER 1998, at 79, 79–80 (M. Cherif Bassiouni ed., 1998). In this respect, Huyse defines amnesty granted by the executive or the legislator in the following words:

Amnesty . . . means that the punishability of certain acts is removed; amnesty thus abrogates crime and punishment; it can be used to foreclose prosecutions, but also to cancel sanctions that have already been imposed. Pardon is, according to BLACK'S LAW DICTIONARY, an "executive action that mitigates or sets aside punishment for a crime." The DICTIONARY adds, "the distinction between amnesty and pardon is one rather of philological interest than of legal importance." Thus, impunity (or immunity) is a *de facto* situation, which is the result of amnesty or pardon.

Id. at 80 n.2.

291. Daniel Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 CRIM. L.F. 87, 119 (1999).

Article 17 stipulates that the “Court shall determine that a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling and unable genuinely to carry out the investigation or prosecution.”²⁹² Thus, if the State is unwilling, the Court shall determine that the case is admissible. In order to reach a decision about “unwillingness,” the Court or the Prosecutor must check whether the State meets the specific criteria listed in article 17(2). Here, a problem arises because these criteria are limited to situations where investigations or prosecutions have already begun. Accordingly, it seems difficult to conclude that a State is “unwilling” in such a situation. In order to determine unwillingness, the Court

shall consider . . . whether one or more of the following exist, as applicable: a) Proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person; b) There has been an unjustified delay in the proceedings which in the circumstances is consistent with an intent to bring the person concerned to justice; c) The proceedings were not or are not being conducted independently or impartially²⁹³

Thus, from a literal reading of the above quoted text, one could conclude that the criteria to determine unwillingness comes into play only at the commencement of an investigation and not prior to an investigation. Moreover, this method of construing the article may be supported by referring to the second part of article 17(1)(a), which stipulates: “unless the State is unwilling.” Thus, a case would be admissible when the State is unwilling, and in order to decide that a State is unwilling, the Court must apply the exhaustive criteria set under paragraph 2, and should not extend them by analogizing. This strict construction, might lead to the conclusion that granting an amnesty prior to an investigation would block the Court’s jurisdiction and would render the case inadmissible, especially since the Statute does not prohibit granting amnesties through any specific provision. The *travaux préparatoires* reveal the drafters’ intent concerning this issue.

At the Rome Conference, the bilateral consultations on the proposal regarding amnesties, pardons, parole or commutation of the sentence were not very successful. Among a wide range of delegations the resistance to the inclusion of such an article remained strong. Delegations continued to argue that the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State. However, other delegations argued that

292. ICC Statute, *supra* note 1, art. 17(1)(a).

293. *Id.* art. 17(2)(a)-(c).

the proposal was not absolutely necessary, as the provisions on admissibility could give the Court sufficient breadth to examine cases of pardons or amnesties made in bad faith. Consequently, the proposal was not included in the final package.²⁹⁴ It seems that the latter view, that the proposal was unnecessary, coincides with the first interpretation of article 17.

Despite the possibility, discussed above, of construing article 17 in a strict manner, the first construction seems to reflect the main purpose and target of the ICC. The Court was created to guarantee that those who commit the heinous crimes mentioned in the Statute must not go unpunished. Thus, a State granting an amnesty without even commencing an investigation allows a *prima facie* determination that the State is precluding that person from facing criminal responsibility. Moreover, if article 17 is to be read in a broader manner, one could conclude that paragraph 1(a) may be understood that the Court “shall determine that a case is inadmissible where . . . [t]he case is being investigated . . . by a State.” This implies that if a State did not conduct an investigation, the case is admissible, because it reflects the State’s bad intention and/or unwillingness. This seems to meet the aforementioned interpretation, which is the first construction. Based on the foregoing, one could conclude that the problem appears from the formulation of article 17 itself and the exclusion of any reference in the Statute governing amnesties.

On the other hand, the situation is different if the State has investigated the case and, in its sovereign wisdom, decided not to prosecute the persons concerned because they had been granted amnesty. It appears that the ICC may differentiate between good faith and bad faith amnesties.²⁹⁵ Thus, both the Prosecutor and the Court could examine and assess the State’s decision not to prosecute in light of article 17. According to Daniel Nsereko, in such a situation, the State concerned

does not have to disclose the reasons for declining to prosecute. But if it does, and says that it has done so in the interests of peace and national reconciliation, the Court will have to listen sympathetically. It should not dismiss out of hand the State’s efforts at national reconciliation as unwillingness or inability to

294. Holmes, *supra* note 86, at 59–60; see also John T. Holmes, *Complementarity: National Courts Versus the ICC*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 678 (Antonio Cassese et al. eds., 2002).

295. However, according to Professor Schabas it is very difficult to provide a set of criteria for determining good faith amnesties. William Schabas, *Statement Made During the ICC Summer Course held at the National University of Ireland, Galway, Ir.* (July 30, 2001).

prosecute. Peace and national reconciliation are legitimate goals for any country to pursue.²⁹⁶

Yet, it could be argued that following this trend is a *de facto* legitimization of impunity. The State could shield the perpetrators from criminal responsibility under the umbrella of national reconciliation.

A related problem arose during the drafting of the Statute. There was a great debate about the attitude that the Court should take to alternative methods of accountability. The South Africans were the most insistent on this point, concerned that approaches like their Truth and Reconciliation Commission, which offers amnesty in return for truthful confession, would be dismissed as evidence of a State's unwillingness to prosecute. Although, there was widespread sympathy with the South African model, it was counterbalanced by memories of the disgraceful amnesties accorded by South American dictators to themselves and their cabal.²⁹⁷ The most poignant example was that of former Chilean President Augusto Pinochet.²⁹⁸ Thus, it has been suggested that genuine but nonjudicial efforts at accountability that fall short of criminal prosecution would have the practical effect of convincing the Prosecutor to set priorities elsewhere.²⁹⁹ This conclusion is surprising, since the simple telling of the truth to a nonjudicial body may convey an individual immunity from national prosecution.³⁰⁰ Yet, judicial attitudes are impossible to predict, and judges or prosecutors might well decide that it is precisely in cases like the South African one where amnesties for such crimes is unacceptable. Only time will tell whether the practice of

296. Nsereko, *supra* note 291, at 119.

297. For a thorough discussion on the issue of disgraceful amnesties, see PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY—HOW TRUTH COMMISSIONS AROUND THE WORLD ARE CHALLENGING THE PAST AND SHAPING THE FUTURE* 32–49 (2001). In this respect,

[t]he armed forces seized power in 1976, and went on to rule the country, in several successive military juntas, for the next seven years. . . . Before leaving power, in fear of being held accountable for its crimes, the military junta granted itself immunity from prosecution and issued a decree ordering the destruction of all documents relating to military repression.

Id. at 33.

298. *Id.* at 35–38. In September 1973, General Augusto Pinochet overthrew the civilian government of Chile, brutally repressed all opponents, and proceeded to rule Chile for seventeen years. The regime espoused a virulent anticommunism to justify its repressive tactics, which included mass arrests, torture, killings, and mass disappearances. The worst of the violence was in the first year after the coup, when some 1200 people were killed or disappeared, and many thousands more were detained, tortured, and eventually released. In 1978, Pinochet instituted an amnesty law, which barred prosecution for almost all human rights crimes that had occurred since the coup.

299. SCHABAS, *supra* note 125, at 68–69.

300. Holmes, *supra* note 86, at 77.

granting amnesties or pardons is acceptable, especially because the Statute left room for this possibility.³⁰¹ The Prosecutor and the Court are granted broad discretion in this respect, either to set precedents which imply that the practice is permitted or block it by determining that those cases are admissible.

A related problem is the question of pardons, which is considered the greatest weakness to the second feature of the complementarity regime, the powers of the ICC. This problem lies in the failure to include in the Statute provisions related to pardons. The lacunae may permit a State to investigate, prosecute, convict, and sentence a person, and then pardon that person soon thereafter.³⁰² This is more than merely hypothetical. In the early 1970s, a U.S. court convicted William Calley of war crimes for massacring hundreds of civilians in My Lai village in Vietnam. For this he was sentenced to life imprisonment. "Then the United States President, Richard Nixon, however, intervened and granted him a pardon after only a brief term of detention had been served."³⁰³

Two contradictory views emerged regarding this crucial issue of pardons. First, according to Professor William Schabas, in a case where an individual is properly tried, but then is subsequently pardoned, the Court would seem to be permanently barred from intervening.³⁰⁴

The opposing view, articulated by Mr. Holmes, sees the *ne bis in idem* principle in article 20(3), as a possible solution to the problem of pardons. He argues that the *ne bis in idem* principle would apply in any case brought before the Court where a person was convicted by the na-

301. In this respect the silence of the ICC Statute concerning issues of amnesties, pardons, and paroles seems to contradict the early statement made by the Secretary General to the United Nations when he said:

[B]ringing war criminals to justice, and making them accountable for their violations, is essential, both as a matter of justice, and else because the ending of impunity is a vital prerequisite for post-conflict peace-building. Ensuring that justice rather than impunity or vengeance triumphs at the end of the day should be our major aim and objective. The principle of individual responsibility for crimes under international law should be reaffirmed.

Message of H.E. Kofi Annan, Secretary-General to the United Nations to the Conference on Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights, Siracusa, Italy, Sept. 16-21, 1997.

302. Holmes, *supra* note 86, at 76.

303. SCHABAS, *supra* note 125, at 70. Nixon only granted Calley a partial pardon freeing him from the stockade and allowing him to stay under house arrest while his lawyers appealed his sentence. A series of appeals reduced Calley's life sentence to twenty years and then to ten. He was eventually paroled after serving only three and a half years under house arrest. William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 683 n.48 (2000); Court TV Online, *The Greatest Trials of All Time: The Court Martial of Lt. Calley*, available at <http://www.courtTV.com/greatesttrials/mylai/aftermath.html> (last visited Nov. 20, 2002).

304. *Id.*

tional court and subsequently pardoned. He further argues that the fact that a pardon or a parole took place shortly after a conviction may give rise to the presumption that the entire proceedings were not genuine; a presumption that may not have been evident during the proceedings themselves.³⁰⁵

While this is a well-founded solution, it does not accommodate all possible situations. William Schabas's example shows that there could be a case where a State genuinely investigates, prosecutes, tries, and sentences an individual. However she or he is pardoned shortly after due to a change of the administration or the leader of that country. In such a situation one could argue that those proceedings were not "for the purpose of shielding the person concerned from criminal responsibility," and were "conducted independently or impartially" and not "in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."³⁰⁶ Even if the new administration's intention was *de facto* a sham, if it occurred subsequent to a *bona fide* trial, the Court seems to be barred from ruling on the case. The conjunction "and" used in article 20(3), appears to be the key to interpreting this paragraph. Because of the conjunction "and" the Court must look not only to the manner in which the proceedings were conducted but also at the administration's intentions at the time the proceedings took place. It seems that Holmes also relied upon the meaning of the conjunction in paragraph 3(b), which requires that during the period where the improper proceedings take place, the intention must be to protect the person from facing criminal responsibility. Thus, Holmes's solution will only be triggered if the administration that oversaw the trial proceeding is the same one granting the pardon.³⁰⁷

The outcome will be subject to the Court's and the Prosecutor's interpretation. If they decide to follow a strict construction in interpreting paragraph 3, there is some doubt about whether Mr. Holmes's opinion will be adopted. Rather the Court will probably agree with Professor Schabas's interpretation. However, if the Court or the Prosecutor choose to adopt a wider construction, as well as look at the main purpose of creating an international justice system, especially as reflected in

305. Holmes, *supra* note 86, at 77.

306. ICC Statute, *supra* note 1, art. 20(3).

307. The idea behind the new administration argument is that a person could be tried perfectly, yet subsequent to his trial and prior to granting him any pardon, a new president is inaugurated. Presumably, the latter does not have any ties to the trial. She or he wants to pardon all the accused persons in the country. In this situation it is impossible to say this pardon reflects that the entire previous proceedings were not conducted independently or impartially or were conducted for the purpose of shielding the person from criminal responsibility. In addition, even if this new president intended to shield that person, a thorough reading of paragraph 3 suggests that it does not cover such a situation.

paragraphs 4 and 5 of its preamble, then, Holmes's view might prevail. Nevertheless, in such a situation it would be very difficult for the Prosecutor to distinguish between good and bad faith pardons. It appears that the solution to these ambiguities will have to wait until the ICC starts functioning. However, it is clear that the failure to include a provision in the Statute which would govern the issue of amnesties or pardons is an enormous gap, which affects the notion of complementarity in both of its two features.³⁰⁸

*A. Amnesties & Pardons as Tools of Impunity that
Threaten the Validity of the ICC Statute*

The ICC Statute left room for States to grant amnesties and pardons. This possibility not only affected the complementarity regime, but also gave rise to other unexpected consequences.

Amnesty and pardon are both bars to punishment. Amnesty can also be a bar to prosecution, because it is usually granted before a prosecution or a conviction. A pardon is usually granted after a person is found guilty.³⁰⁹ The main problem in this context is when should an amnesty or a pardon not be granted? Are these crimes, punishable under the ICC, crimes whose very nature prohibits them from being subject to an amnesty or a pardon, whether directly or indirectly?

The crimes the ICC drafters included in the ICC's jurisdiction are genocide, war crimes, crimes against humanity, and aggression. These are offenses against the law of nations, *delicti jus gentium*, and by their very nature affect the world community as a whole.³¹⁰ It is these crimes that the world community found so heinous that they require a high mechanism of repression, and therefore placed them under the subject matter jurisdiction of the Court.

Given the gravity of these crimes and their extraordinary nature, the legal literature discloses that these international crimes rise to the level

308. This is true, since granting a blanket amnesty to a person prior to investigation means no prosecution will take place, which runs counter to the idea that the State has the primary duty to prosecute. On the other hand, the second feature of complementarity would be affected by applying pardons, for example, since this conduct often reflects a State's unwillingness to prosecute, and the Court would be barred from taking any action toward that person. However, this deduction is based on the strict construction of the Statute as mentioned above.

309. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 223, at 629–30. In this respect, the author argues that amnesty and pardon, however, also apply to situations where a person has been legally found to have committed a crime and is subsequently given the benefit of a remission of sentence or a removal of the consequences of the criminal conviction.

310. *Id.* at 566.

of *jus cogens*.³¹¹ *Jus cogens* holds the highest hierarchical position among all other norms and principles of international law.³¹² This legal basis can be found in international pronouncements, or what can be called international *opinio juris*, that reflect the recognition that these crimes are deemed part of general customary law. Language in preambles³¹³ such as that of the ICC Statute³¹⁴ or other provisions of treaties applicable to these crimes, also indicate that these crimes have a higher status in international law. Another indication is the large number of States that have ratified treaties related to these crimes.³¹⁵ In addition the ad hoc international investigations and prosecutions of perpetrators of these crimes by the IMT, ICTY, and ICTR also emphasize the gravity with which the world views these crimes. The writings of scholars and diplomats further buttress this legal foundation. It is argued that the establishment of a permanent international criminal court with inherent jurisdiction over these crimes would further raise the status of crimes such as genocide, crimes against humanity, war crimes, and aggression to being part of *jus cogens* and would impose obligations *erga omnes* to prosecute or extradite.³¹⁶

From an analytical reading of the above paragraph, one could observe that *jus cogens* norms hold a very high position among other norms. However, it is said that *jus cogens* norms not only occupy a high position, but also hold the highest hierarchical position among all other norms and principles.³¹⁷ The implication of recognizing these international crimes as part of *jus cogens* applies to them the universality of jurisdiction, makes statutes of limitation inapplicable to them, and carries the duty to prosecute or extradite.³¹⁸ The principle *aut dedere aut judicare*—prosecute or extradite—dates back to Grotius, one of the earliest international legal scholars. The purpose of the principle is to ensure that those who commit crimes under international law are not

311. M. CHERIF BASSIOUNI, 1 INTERNATIONAL CRIMINAL LAW: CRIMES 41 (2d ed. 1999).

312. *Id.* at 40.

313. See, e.g., Genocide Convention, *supra* note 28, ¶ 1; Apartheid Convention, *supra* note 49, ¶ 5. In this respect, the Preamble of the Genocide Convention was cited by the ICTR in its sentencing decisions. See Prosecutor v. Kambanda, No. ICTR 97-23-S, ¶ 16 (Sept. 4, 1998); Prosecutor v. Serushago, No. ICTR 98-39-S, ¶ 15 (Feb. 5, 1999).

314. ICC Statute, *supra* note 1, ¶¶ 3, 4.

315. See, e.g., Genocide Convention, *supra* note 28, available at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm> (listing 133 States as of Nov. 20, 2002); Apartheid Convention, *supra* note 49, available at http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm (listing 101 States as of Nov. 20, 2002).

316. BASSIOUNI, *supra* note 311, at 40.

317. *Id.*

318. *Id.* at 39.

granted safe haven any where in the world, thus making prosecution mandatory.³¹⁹

Above all, the characterization of certain crimes as *jus cogens* places upon States the *obligatio erga omnes* not to grant impunity to the violators of such crimes.³²⁰ In the ICJ's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*,³²¹ the court reflected the current genesis of the concept *obligatio erga omnes* for *jus cogens*. The *erga omnes* and *jus cogens* concepts are often presented "as two sides of the same coin."³²² The term "*erga omnes*" means "flowing to all," and therefore obligations arising from *jus cogens*, which means "compelling law," are probably *erga omnes*. "Indeed, legal logic supports the proposition that what is 'compelling law' must necessarily engender an obligation 'flowing to all.'"³²³

The previous discussion about pardons and amnesties revealed how the Statute itself seems to leave room for States to practice impunity. This is supposed to be prohibited according to the concepts of *jus cogens* and *erga omnes*.³²⁴

It would not be enough for the ICC Statute to raise the possibility of monitoring and determining bad faith amnesties or pardons. Even amnesties granted by Truth Commissions such as that of South Africa, are unacceptable. The main practice of that type of commission is to substitute prosecutions with confessions. The practice of amnesties or pardons

319. *Id.*

320. *Id.*; see also Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 393 (2001); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 66 (1996).

321. Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of Genocide*, 1951 I.C.J. 15, 23 (May 28) [hereinafter ICJ Advisory Opinion]; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. and Herz. v. Yugoslavia)*, 1996 I.C.J. 27-33, ¶ 31 (July 11). The ICJ opinion regarding obligations *erga omnes* is that it follows from the "object and purpose of the [Genocide] Convention that the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*." *Id.* This wording emphasizes that the Convention imposes an obligation *erga omnes* to punish and prevent the crime of genocide.

322. BASSIOUNI, *supra* note 311, at 44.

323. *Id.* According to BLACK'S LAW DICTIONARY, "*jus cogens*" is a mandatory norm of general international law from which no two or more nations may exempt themselves or release one another. BLACK'S LAW DICTIONARY 864 (7th ed. 1999).

324. See, e.g., *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5). The ICJ defined the concept of *erga omnes* and its legal effect toward the entire community in the following terms:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Id.

whether in good faith or bad faith leads to the same conclusion, namely, that they legitimize impunity.

The purpose of the ICC, which arises from the *jus cogens* nature of these crimes, is to provide an effective forum for the prosecution and suppression of these violations. Thus, in a situation of a *bona fide* amnesty or pardon, a decision not to prosecute would conflict with the State's obligation under international law to suppress and punish these offenses.³²⁵ The Rome Treaty does not have any explicit provision to prohibit the practice of amnesty or pardon over such crimes.³²⁶ The *travaux préparatoires* are evidence that States intended³²⁷ to exclude a provision prohibiting pardons or amnesties in the Statute.³²⁸ Given the fact that this omission allows such an undesired practice in regard to these crimes,³²⁹ one could suggest that the treaty is legitimizing impunity, and thus, infringing the peremptory norm of *jus cogens*.

325. Naomi Roht-Arriaza, *Amnesty and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 78 (Dinah Shelton ed., 2000).

326. However, the Statute incorporated a provision in article 110, which governs the execution and reduction of sentences rendered by the Court. ICC Statute, *supra* note 1, art. 110.

327. According to the subjective school of interpretation, which is also known as the "Founding Fathers' School," the object of interpretation is to ascertain the intention of the parties and give effect to them. Moreover, as Professor Westlake has said, "[t]he important point is to get at the real intention of the parties. . . ." P. K. MENON, THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS 71-72 (1992). While according to Sir Hersch Lauterpacht, "[i]ntention of the parties must be the paramount factor in the interpretation of treaties." *Id.* (citing H. Lauterpacht, *Restrictive Interpretation and the Principles of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. OF INT'L L. 48, 75 (1949)).

328. Holmes, *supra* note 86, at 59-60; *see, e.g., 1996 PrepCom Report, Vol. 1, supra* note 87, at 37, ¶ 160 (reflecting the delegation's intention toward legitimizing the practice of amnesties granted by truth commissions by stating, "[i]t was further suggested that consideration should be given to how the complementarity regime would take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace processes."); *1996 PrepCom Report, Vol. 2, supra* note 87, at 294-96 (indicating no reference for prohibiting pardons or paroles concerning the crimes within the jurisdiction of the Court at the national level).

329. ICJ Advisory Opinion, *supra* note 321. In its decision, the Court set specific criteria for determining whether it is possible to make reservation to the Genocide Convention, absent any provision or text referring thereto. It wrote, "[i]n the absence of an article in the Convention providing for reservations, one cannot infer that they are prohibited. In the absence of any express provisions on the subject, to determine the possibility of making reservations as well as their effects, one must consider . . . their mode of preparation and adoption." Advisory Opinion of 28 May 1951, *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, ICJ Case Summaries, available at <http://www.icj-cij.org/idecisions/isummaries/ippcojsummary510528.htm>. Accordingly, one could conclude that in the absence of an article in the ICC Statute providing for amnesties or pardons, one must consider their "mode of preparation and adoption," that is, the *travaux préparatoires*. This reflects the common intention.

According to article 32 of the Vienna Convention, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the

Within the law of treaties, *jus cogens* imposes a sanction—in the form of invalidating any treaty which conflicts with it—and a deterrence on concluding treaties with an unlawful object.³³⁰ According to article 53 of the Vienna Convention “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”³³¹

Based on the above analysis of the ICC Statute and its practical application, it can be argued that this analytical conclusion raises some doubt regarding the validity of the Rome Statute. In addition, based on this conclusion, one could further argue that when a later treaty conflicts with the provision of an earlier treaty, subject to specific criteria, the later would be void.

Lord McNair suggests a case which would render the later treaty null and void. He argues that when there exists a conflict between a treaty to which States A and B are parties and a later treaty to which States A and C are parties, the treaty may be void and null if “the earlier treaty is of a constitutive character (such as the Charter of the United Nations) and State A later concludes a treaty which is in conflict with an imperative provision of the earlier treaty.”³³²

By applying this conception to the situation of the ICC, one might reach a similar conclusion to that of Lord McNair. For example, the Genocide Convention,³³³ the Apartheid

circumstances of its conclusion . . . to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure . . . ” Vienna Convention, *supra* note 95, art. 32. Thus, according to the preparatory work, it was clear that the drafters intended not to incorporate such an article that limits the practice of amnesties or pardons to ordinary crimes and not the heinous crimes. Moreover, from an analytical standpoint of the final decision of the Court, one might suggest that since reservations seem to be prohibited with regard to any of the provisions of the Convention, one might wonder how the ICC Statute could permit any practice that runs counter to the provisions of the Convention, namely, the obligation to punish and to provide effective penalties, given that most of the States Parties to the Treaties are common to both. In addition, allowing the latter practice infringes article 31(3)(c) of the Vienna Convention, which refers not only to “relevant rules of international law applicable in the relations between the parties,” but also other treaty obligations existing for the parties. I. M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 76 (1973).

330. LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 175 (1988).

331. According to Anthony Aust, “[i]f part only of a treaty conflicts with an existing *jus cogens* the whole of the treaty is void, not just the offending part.” ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 258 (2000).

332. SINCLAIR, *supra* note 329, at 62–63; *see also* Vienna Convention, *supra* note 95, art. 30.

333. Genocide Convention, *supra* note 28, at 280. However, according to Professor Schabas, although a general amnesty for genocide would be contrary to the Convention, under exceptional circumstances it could be acceptable. He observes that there are other forms instead of prosecution, which could be followed in these specific situations:

Convention,³³⁴ the Convention Against Torture,³³⁵ and the 1949 Geneva Conventions³³⁶ impose a common obligation to prosecute and punish those who commit the crimes discussed above. Most of the Parties to these Conventions are or will be Parties to the Rome Convention. The ICC Statute allows the possibility of waiving this obligation to prosecute and punish these grave offenses, by permitting amnesties and pardons. As previously argued, this could lead to impunity. Therefore, the treaty would be in conflict with any of the imperative provisions concerning punishment and prosecution set forth under these earlier Conventions. It seems that the weakness of the complementarity regime in the Statute regarding the issue of amnesties and pardons might cause future legal obstacles concerning the application of the treaty, and perhaps even its invalidation under international law.³³⁷

Ordinary criminal law recognizes a variety of forms in which prosecutorial discretion may be exercised, for example by granting immunity from prosecution in return for incriminating testimony of accomplices. Priorities may also be established where there are a large number of accused and limited resources with which to try them. This is precisely the problem that confronted Rwanda following the 1994 genocide. Rwanda's effort[s] at prosecution for genocide are hampered by its desperate shortage of resources and the sheer numbers of the accused. At some point it may be unable to continue and decide to accept some alternatives to criminal prosecution . . . Transitional regimes may also consider alternative mechanisms for justice and reconciliation such as truth commissions. In the context of another crime against humanity, apartheid, South Africa granted amnesties to individual criminals who appeared before the Commission and who testified to their involvement in the crimes of the previous regime. Defenders of the South African approach explained that this was the only way to allow transition to majority rule without the terrible bloodshed that would accompany the otherwise inevitable civil war. All of these measures may be deemed, in effect, to be exceptions to the obligation to prosecute contained in the Convention. To the extent that they contribute to the ultimate goals of the Convention, it may be argued that they are acceptable. Each case must, of course, be examined on its own individual merits.

SCHABAS, *supra* note 18, at 399–400. Based on the foregoing, one may suggest that Schabas's opinion tends to reach a practical compromise between the law and the reality. It seems that he tries to avoid the strict construction of the law. However, he is trying to apply the law by placing it in a wider frame of interpretation through looking at the very purpose and goals of the Convention and not the strict meaning of the articles. But can these goals be achieved effectively through these alternative means by excluding the element or the policy of deterrence?

334. Apartheid Convention, *supra* note 49, pmbl. ¶ 9, art. 4.

335. Convention Against Torture, *supra* note 49, arts. 2(1), 4(2).

336. Geneva Conventions I-IV, *supra* note 44.

337. The purpose of this Section is to demonstrate that excluding some important provisions could lead to serious legal problems. However, the whole argument could be countered if viewed from a different perspective. One could argue that the reference to paragraphs 4 and 5 of the preamble, which affirm that these crimes, must not go unpunished, by putting an end to impunity suggests that the silence of the Statute with regard to the practice of amnesty and pardon over these crimes could be interpreted as prohibition of such practices. In other words, in practice the person who is applying the Statute could interpret it in a way to be consistent with the purpose and object of the treaty. Thus, according to articles 26 and 31 of the Vienna Convention, the treaty must be performed and interpreted in good faith and in light of its

B. Complementarity and Statutes of Limitations

The legal effect of a statute of limitations has a procedural effect in that it is a bar to prosecution, and a substantive effect because it extinguishes the offense for the purpose of its legal effects (substantive). The legal effects of a statute of limitations and amnesty may be treated alike regardless of whether they extinguish the criminality of the actor or constitute a bar to prosecution.³³⁸

International crimes which are *erga omnes* are not subject to statutes of limitations. These include, *inter alia*, aggression, war crimes, crimes against humanity, genocide,³³⁹ and apartheid.³⁴⁰ Although the conventions concerning the latter two crimes do not contain a provision concerning statutes of limitations, a literal reading of the treaties prohibiting the application of a statute of limitations to war crimes and crimes against humanity suggests that the crimes of genocide and apartheid are also not subject to statutes of limitations.³⁴¹ However, these treaties do not have a

object and purpose. Any judge applying the Statute could read and construe the Statute as it prohibits the practice of amnesties and pardons, because such practice runs counter to the purpose of the treaty and contradicts its preamble, which is considered part of that treaty. This conclusion will direct us to the same point mentioned in this Subsection, that is, the Court could assert jurisdiction and override the jurisdiction of that State which practiced amnesty. Thus, in practice the principle of complementarity would be defeated or extremely weakened, since the Court would be overloaded with cases. The Court might collapse under such a burden. This was not the intention of creating this principle. The principle was created, *inter alia*, to distribute the work. The ICC comes into play only when the national courts fail to fulfill their duties and the case is of certain gravity, which justifies the Court's intervention.

338. BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 223, at 608.

339. *Att'y Gen. of Gov't of Israel v. Eichmann*, 36 I.L.R. 5, at 78-79, ¶ 53 (Dist. Ct. Jerusalem 1961). Eichmann pleaded that his prosecution was time barred, invoking a fifteen-year limitation period in force in Argentina. The District Court ruled that Argentine norms could not apply. It also noted a provision in the applicable Israeli legislation declaring that "the rules of prescription . . . shall not apply to offences under this Law." *Id.* at 78-79, ¶ 53. See also William Schabas, *Non-Applicability of the Statute of Limitations*, in COMMENTARY OF THE ROME STATUTE, *supra* note 25, at 523 [*hereinafter* Schabas, *Non-Applicability of the Statute of Limitations*]; SCHABAS, *supra* note 18, at 417.

340. Schabas, *Non-Applicability of the Statute of Limitations*, *supra* note 339, at 619; see also Bassiouni, *supra* note 320, at 63. Even torture is considered *jus cogens*, and imposes an *obligatio erga omnes* not to be subject to statutes of limitations.

341. See, e.g., Convention on the Non-Applicability of Statutory Limitations to Crimes and Crimes Against Humanity and War Crimes, art. 1, Jan. 25, 1974, 754 U.N.T.S. 73. Article 1 reads:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

....

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid,

great number of States that have signed and ratified them.³⁴² The low rate of adhesion to the U.N. Convention on Non-Applicability of Statutes of Limitations³⁴³ has led some academics to contest the suggestion that this is a customary norm. The insignificance of their suggestion was demonstrated and emphasized by the approach of the French Court of Cassation in the *Barbie* case. The Court ruled that the prohibition on statutory limitations for crimes against humanity is now part of customary law.³⁴⁴

Unlike the problem of amnesty and pardons, which the ICC drafters failed to solve, the ICC Statute makes a significant contribution to international criminal law in this regard. It contains a provision that bars the applicability of statutes of limitations to the crimes within the jurisdiction of the Court.³⁴⁵ Although the debates surrounding adoption of article

and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Id.; see also European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of January 25, 1974, art. 1, E.T.S. 82 [hereinafter European Convention on Statutory Limitation]. Article 1(1) reads:

Each Contracting State undertakes to adopt any necessary measures to secure that statutory limitation shall not apply to the prosecution of the following offences, or to the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law: 1. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations . . .

Although the Convention did not make any reference to the crime of apartheid, a thorough reading of paragraphs 6 and 7 of the preamble and article 1 of the Apartheid Convention emphasizes that it is a crime against humanity and thus not subject to statute of limitations.

342. However, there were some other attempts made on the international level, which took the form of General Assembly Resolutions. See G.A. Res. 3, U.N. GAOR, 1st Sess., U.N. Doc. A/Res/3 (1946); G.A. Res. 2583, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/Res/2583 (1969); SCHABAS, *supra* note 18, at 404.

343. The United Nations instrument still has only forty-three States Parties. 754 U.N.T.S. 73. Note also the paltry number of States who signed or ratified the European Convention: as of October 31, 2002, only the Netherlands and Romania had signed and ratified the Treaty, compared to France and Belgium which had only signed it. European Convention on Statutory Limitation, *supra* note 341, available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

344. *Federation Nationale des Deportés et Internes Résistants et Patriotes and Others v. Barbie*, 78 I.L.R. 125, 135 (Fr. Ct. of Cassation 1984). Since apartheid is considered a crime against humanity and some acts of torture rise to such level of criminalization, the *Barbie* decision obviously covers these categories as customary law.

345. However, Schabas writes:

None of the preceding international instruments concerned with international prosecution of atrocities, from the Charter of the International Military Tribunal to the Statutes of the Ad Hoc Tribunals, has contained anything similar. This is only logical, because in the absence of texts within the instruments creating a time bar, silence was all that was required. Nevertheless, Control Council Law No. 10 stated that: "[I]n any trial or prosecution for a crime herein referred to the accused shall not

29 of the ICC Statute revealed a lack of unanimity on the subject, the result clearly demonstrates the Statute's contribution to the progressive development of international law.³⁴⁶

During the drafting process,³⁴⁷ with the exception of a handful of delegations, among them China and Japan, no one spoke against the principle that the crimes within the jurisdiction of the Court should not be subject to any statutory limitations. Even countries that applied a statute of limitations to every crime in their national system accepted this, notwithstanding the repercussions this would have because of complementarity. "France argued that the principle should be valid for genocide and crimes against humanity, but that a statute of limitation was necessary for war crimes."³⁴⁸ In light of their argument, their subsequent action was to be expected. France is the only country, which declared that it does not accept the jurisdiction of the Court with regard to war crimes for a period of seven years after the entry into force of the Statute.³⁴⁹ In the end, the only exception from nonapplicability of statutes of limitations was made for offenses against the administration of justice.³⁵⁰

Professor Schabas argued that article 29 of the Statute is unnecessary, at least to the extent it would be applied to trials before the Court for offenses listed under article 5. Inevitably, in the absence of a provision actually establishing statutory limitations, the silence of the Statute can only mean that there are no statutory limitations. However, article 29 is not superfluous, since it would appear to be part of the complex relationship between national and international judicial systems.³⁵¹ It

be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945." Since *Control Council Law No. 10* was applicable to national prosecutions within Germany, the provision was required in order to neutralize any alleged time bar to trials for Nazi-era crimes.

Schabas, *Non-Applicability of the Statute of Limitations*, *supra* note 339, at 523.

346. *Id.* at 524.

347. For thorough references to the drafting process, see, for example, *Report of the Inter-Sessional Meeting in Zutphen*, *supra* note 115, art. 21(F) (containing five different proposals on statutes of limitations); *1996 PrepCom Report, Vol. 1*, *supra* note 87, ¶¶ 195–196. In this respect, "[s]ome delegations were of the view that, owing to the serious nature of the crimes to be dealt with by the Court, there should be no statute of limitations for such crimes. . . ." *Id.*; see also *1996 PrepCom Report, Vol. 2*, *supra* note 87, art. F. However, the first proposal under article F permits the time lapse for the crimes within the jurisdiction of the Court. Proposal 1 reads, "[t]he period of limitation shall be completed upon the lapse of xx years for the offence of . . ."

348. Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS*, *supra* note 86, at 204.

349. ICC Statute, *supra* note 1, art. 124.

350. *Id.* art. 70; see also ICC Rules, *supra* note 173, rule 164.

351. Schabas, *Non-Applicability of the Statute of Limitations*, *supra* note 339, at 525.

provides the key to the application of the complementarity principle, and to interpreting how the regime should be applied.

In fact, many domestic criminal law systems provide a statute of limitations for even the most serious of crimes. For example, under article 15, paragraph 1 of the Egyptian law of criminal procedure, prosecutions for murder are barred after ten years. The French law has a similar provision in article 7 of its code of penal procedure.³⁵² In general, codes derived from the Napoleonic model have similar provisions. Therefore, on these countries, and others with similar legislation, article 29 imposes an obligation to amend their national legislation by eliminating provisions that are incompatible with article 29. Should national courts contradict the essence of article 29 by granting exemptions from prosecution and trial based on statutory limitation, the complementarity provisions of the Statute will grant the ICC jurisdiction. This problem was also observed during the Rome Conference and it was included in a footnote that reads:

[T]he absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the ICC would still be able to exercise jurisdiction.³⁵³

Thus, States Parties must ensure that their legislation is consistent with article 29, which will help ensure that their courts, not the ICC, try such crimes. However, would this be sufficient to ensure that those who commit the most serious crimes do not go unpunished?

C. Complementarity—Statutes of Limitations and the Problem of Third States

This Subsection will answer the aforementioned question through tracing an important gap in the Statute, which could affect the appropriate functioning of the second feature of the complementarity regime. The example that will be explored below, demonstrates that there could be a situation or a case where the Court could be barred from prosecuting the accused, even though the national legislation of a State Party has not changed.³⁵⁴

352. EGYPTIAN CODE OF CRIMINAL PROCEDURE art. 15(1) (1950); C. PR. PÉN. art. 7.

353. SCHABAS, *supra* note 18, at 415; *see also* Schabas, *Non-Applicability of the Statute of Limitations*, *supra* note 339, at 525.

354. This scenario assumes that the Statute entered into force and the crime was committed later, but the person escaped for “x” years and then returned back to the country before the

Suppose that P, who is a national of a non-party State Y, committed a crime within the jurisdiction of the Court on the territory of a State Party X. State Party X has not yet amended its national legislation with regard to the application of statutes of limitations to the crimes within the jurisdiction of the Court. Theoretically, the ICC would have jurisdiction over the crime and the accused, since the crime was committed on the territory of the State Party X. However, since the latter's legislation may still bar the prosecution of the accused if the time limit has passed, the ICC could intervene if the State Party has not yet initiated an investigation on the ground that the State Party is "unable to carry out its proceedings."³⁵⁵

Inevitably, the ICC may act in accordance with article 89(1) and request the arrest and surrender of P to the State Party X where that person resides. Meanwhile, non-party State Y requests the extradition of its national P because of a bilateral treaty between the two countries. In this context, the requested State X may consider the case according to its own statute of limitations provision,³⁵⁶ and shall satisfy itself that the requirements of double criminality have been met. On the other hand, the requesting non-party State Y has a similar provision to State X concerning the statute of limitations regarding the crime in question. Thus, there might not be any grounds for refusal to the extradition request for that State Y, other than the request of the ICC.

Article 90(4) of the ICC Statute stipulates that: "If the requesting State is a State not Party to this Statute the requested State, if not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible." According to the above scenario, State X is under an obligation to extradite person P to State Y, and according to article 90(4) the latter shall have the priority in this situation. Therefore, the ICC would be permanently barred from prosecuting the person, since non-party State Y might be unwilling to try that person, either because the statutory limitation for the crime has passed immediately subsequent to his extradition or for any other reason. Moreover, two States could organize this scenario intentionally between them to avoid the Court's jurisdiction over the case. Thus, the second feature of the complementarity regime in this situation failed to fulfill the expected duty, that is, to prosecute when the national jurisdiction

time has lapsed with respect to the crime, which was committed on the territory of that State Party, and the latter has not yet started an investigation.

355. ICC Statute, *supra* note 1, art. 17(3). Presumably, in this situation the Prosecutor's assessment of the admissibility of the case would rely upon two criteria. First, that the State had not yet started investigating the case. Second, according to the Prosecutor's information, the State Party still has a time limit for such a crime.

356. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 223, at 608–09.

fails. It seems that the gaps in other parts of the Statute would inevitably affect the proper functioning of complementarity through other provisions in the Statute.

V. COMPLEMENTARITY AND THE SECURITY COUNCIL

A. *The Security Council's Referral: Article 13(B)*

One of the greatest strengths of the complementarity regime in the Statute appears in the relationship between the Court and the Security Council's referrals.³⁵⁷

Given that the Security Council is a political body, referral is more likely to be the result of a majority political decision. From a purely formal standpoint, in fact, referral represents the interests of all the United Nations Members (or even the international community given the quasi-universality of United Nations membership).³⁵⁸ Accordingly, the referral of a situation by the Security Council is deemed a reasonable basis for the Prosecutor to initiate an investigation, without the preventive review of the admissibility of the situation with an eye to the application of the principle of complementarity.³⁵⁹ However, due to the vast powers granted to the Security Council, which might be influenced by political decisions, the ICC Statute intentionally weakened the use of these powers concerning situations referred to the Court by the Council. The Statute declined to follow the expected norm and moved toward making even the situations referred by the Council subject to judicial review. The principle of complementarity, which is the cornerstone of the ICC, was semi-preserved in this context.

Article 13(b) of the Statute provides that the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter

357. *But see* Newton, *supra* note 121, at 44 (arguing a Chapter VII referral is a limit to complementarity, since this practice would override a State's inherent national authority to insist on using its own judicial processes as the forum of first instance). While this argument is well-reasoned, the final assessment whether this practice weakens or strengthens complementarity merely depends on the angle through which this assessment is made. According to article 53 complementarity appears to be strengthened by the provisions set therein.

358. U.N. CHARTER, art. 24; *see also* CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, *supra* note 60, at 202-03. By the terms of Article 24, members of the U.N. not only "confer" on the Security Council the responsibility, but also agree that in carrying out its duties the Council "acts on their behalf."

359. Pietro Gargiulo, *The Controversial Relationship Between the International Criminal Court and the Security Council*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, at 84.

VII of the Charter of the United Nations.” Thus, article 13(b) thereby acknowledges the enforcement powers of the Council acting under Chapter VII of the U.N. Charter, to refer a situation to the Prosecutor in which one or more of the crimes falling within the jurisdiction of the Court appears to have been committed. These enforcement powers of the Security Council bind all Members of the United Nations. Accordingly, the situations referred by the Council could also involve a non-party State without violating international norms.

Article 13(b) should not be understood incorrectly or in too broad a sense. The powers of the Security Council reflected in the article are limited to situations where the Council is acting in accordance with Chapter VII. The existence of such limits suggests a certain caution in analyzing the recent practice of the Security Council. Not all measures that the Council decides under Chapter VII can be taken until, according to article 39 of the U.N. Charter, the Security Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression.” Since its power with respect to the activity of the ICC is tied to Chapter VII, the ascertaining of the existence of *delicti jus gentium* in order to refer a situation to the Court must be preceded by the determination outlined in article 39. Thus, the Council is not authorized to say what the law is before ascertaining whether one of the situations provided for by article 39 exist. The Security Council should first verify the existence of a more or less objectively identifiable factual situation (certainly more identifiable in the case of aggression or breach of the peace, less so in the case of simple threat). Only after having done so, it can declare that in this situation “one or more of such crimes appears to have been committed.”³⁶⁰ Hence, the Security Council could not directly ascertain the existence of acts of genocide, war crimes, and crimes against humanity and deduce from them the existence of one of the situations provided by article 39. This is the logical interpretation of article 13(b); otherwise, the Security Council would be acting as a judicial body, and thus, would impede the functioning of the Court.

Lattanzi argues that in light of the principle of complementarity, before referring to the Court a situation of alleged crimes connected with the situations envisaged in article 39 of the U.N. Charter, the Security Council should take into account whether a State is willing and able to repress these crimes.³⁶¹ However, this attitude might turn the Security Council from a political body into a judicial body. Moreover, the entire

360. Flavia Lattanzi, *The Rome Statute and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism*, in 1 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 16, at 62–63.

361. *Id.* at 63.

practice of the Council should be consistent with the essence of the Statute. The latter rejected giving the Council the ability to refer a “case” or a “matter,” choosing instead the concept of “situation” in order to avoid the possibility of the Council acting as a judicial body. This was done to preserve the Court’s independence in the exercise of its jurisdiction, since the referral of a “case” would be a matter within the discretion of the Court based on its investigations.³⁶² Thus, leaving room for the Council to determine admissibility issues before referring a situation would be a clear interference with the Court’s authority and independence, and might lead to improper assessments based on political approaches. This could have a negative effect on the appropriate functioning of the Court.³⁶³ However, it is difficult, if not impossible, to determine the Security Council’s intention, because practically it could take into account the admissibility criteria or any other criteria before referring any situation.

It is interesting to note that, even if the Security Council makes an admissibility determination and decides to refer a situation based on its determination, the complementarity principle comes into play and the Council’s assessment is contingent on the Court. As mentioned at the beginning of this Section, the complementarity provisions in the Statute appear to limit the exclusive powers granted to the Council acting under Chapter VII.

Article 53 of the Statute seems to be the key to limiting this power of the Council. Paragraph 1 stipulates that:

[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed In deciding whether to initiate an investigation, the Prosecutor shall: . . . b) [consider whether] the case is or would be admissible under article 17; and c) tak[e] into account the gravity of the crime.³⁶⁴

If the Prosecutor decides “not to initiate an investigation under article 53, paragraph [1], he or she shall promptly inform in writing . . . the Security Council in respect of a situation covered by article 13, paragraph (b).”³⁶⁵ Paragraph 2 stipulates that: “if, upon investigation, the Prosecutor con-

362. Yee, *supra* note 207, at 147.

363. There could be situations that deserve investigation by the Prosecutor, but due to the improper assessment of the Council, the situation was not referred to the Prosecutor, causing those involved to flee justice. On the other hand, another situation could exist which does not deserve investigation, but the Council determined that it might, nonetheless, be admissible. The latter example poses no problem, since the final word would be for the Prosecutor and the Court.

364. ICC Statute, *supra* note 1, art. 53(1).

365. ICC Rules, *supra* note 173, rule 105(1).

cludes that there is not sufficient basis for a prosecution because: . . . b) The case is inadmissible under article 17 . . . the Prosecutor shall inform the Pre-Trial Chamber . . . or the Security Council in a case under article 13, paragraph (b), of his or her conclusion³⁶⁶ Paragraph 3(a) reads: "At the request of . . . the Security Council under [article] 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision."³⁶⁷

Thus, according to the above, it is clear that the Prosecutor could dismiss any situation referred to him or her, even those referred by the Security Council.³⁶⁸ This practice is an exception to the general powers of the Security Council. For example, imagine the Council acting under Chapter VII has determined that a situation that threatens the peace exists. On the other hand, the Prosecutor has decided not to proceed and stands in opposition to the Council's decision. This conclusion might lead to a misunderstanding. One could argue that in such a case the Prosecutor's decision runs counter to the principles, purposes, and provisions of the U.N. Charter, since such a decision disregards a determination made by the Council that there is a threat to peace. However, the Court is neither a State Party to the U.N. nor a U.N. body.

The provision set out in article 53 is a corollary to the first feature of the principle of complementarity—protecting national jurisdiction—and reflects the strength of the complementarity regime to resist the powers of the Council. This provision seems to protect States' sovereignty from the powers of the Council by granting the Prosecutor discretion to determine whether to initiate an investigation. Nevertheless, article 53(3)(a) seems to grant the Council another chance, by allowing the possibility of having the Prosecutor's decision not to proceed revised. This is a normal result because of the far-reaching powers granted to the Prosecutor. However, the Pre-Trial Chamber monitors this power, and seems to act as a filter for the Prosecutor's decision.

Moreover, article 19 confirms the application of complementarity to referrals by the Security Council. It provides a second opportunity to States, even non-party States, to stop a prosecution by challenging the admissibility of a "particular case" on the grounds set out in article 17. By guaranteeing all those "who have referred the situation under Article

366. ICC Statute, *supra* note 1, art. 53; *see also* ICC Rules, *supra* note 173, rule 106(1).

367. ICC Statute, *supra* note 1, art. 3(a); ICC Rules, *supra* note 173, rule 107.

368. It could be argued that the Court is authorized to review the legality or the accuracy of the Council's decision regarding the existence of threats to international peace and security. This argument could be based on the early decision in the *Tadic* case challenging the competence and the jurisdiction of the ICTY, when the Court examined whether the Council is authorized to create a judicial body and impose legal obligations via such a body.

13,” the chance to submit observations to the Court, the rule indirectly confirms the applicability of terms for admitting a case even when it is the result of a Security Council initiative.³⁶⁹

Obviously, by authorizing the Security Council to bring a situation before the Court, article 13(b) is a significant exception to the consensual basis of the ICC’s jurisdiction. However, this is checked by the complementarity principle in the ICC Statute.

B. Complementarity and the Security Council’s Deferral: Article 16

While the powers of the Security Council appear to be governed and limited by the complementarity provisions set out in articles 19 and 53 of the Statute, article 16, on the other hand, seems to empower the Council to block the power of the Prosecutor and the jurisdictional activity of the Court. This is the most controversial aspect of the role of the Security Council in the Statute. It is certainly the source of the greatest difficulty with respect to ensuring the establishment of an independent and impartial jurisdictional mechanism. As it now reads, article 16 is the result of compromises and, overall, is better than the initial ILC proposal. In it, the Court clearly appeared as an organ dependent upon the Security Council and subordinate to its action.

Under article 23(3) of the ILC Draft Statute, “[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.” The provision attempted simultaneously to reconcile the priority of the Security Council action in restoring and maintaining peace and security and the need to coordinate the activities of the Security Council and the Court.³⁷⁰ A large number of delegations opposed the solution proposed in article 23(3) of the ILC Draft Statute on various grounds. One of the objections was that the Council, which was regarded as a political organ, could interfere with the independent functioning of the ICC. The mere placement of a situation on the agenda of the Council, where it could remain under consideration for an indefinite period could deprive the Court of jurisdiction.³⁷¹ Once the Council decides to debate the “situation” the veto of one permanent Security Council member could prevent or stop the ICC from

369. Gargiulo, *supra* note 359, at 84–85.

370. *Id.* at 86.

371. Yee, *supra* note 207, at 150.

acting, thereby rendering the Court politically dependent on the Council.³⁷²

The search for a compromise formulation coalesced around what eventually became known as the *Singapore Compromise*. At the August 1997 session of the PrepCom, Singapore formally proposed an amendment revising the structure of the ICC-Security Council relationship as initially proposed in the 1994 ILC Draft Statute. The Singapore text became the basis for drafting work of the second option of article 23(3). It stated that “[n]o investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.”³⁷³ The compromise proposed the opposite effect to that of the first option of article 23(3) of the ILC Draft Statute. Thus, proceedings of the Court may proceed, unless the Security Council makes a formal decision to stop the process. Since the adoption of a Security Council decision requires a minimum of nine affirmative votes in the Council, only a concerted effort by the Council’s members can stop the Court’s proceedings.³⁷⁴ Theoretically, not even all five permanent members joined together can block a Court’s proceedings, since nine positive votes including the five permanent members’ are required.³⁷⁵ Thus, pursuant to the Singapore formula, the negative veto given to the Council in the ILC text would be replaced by a positive arrangement where the Court could exercise its jurisdiction unless it was directed not to do so by the Council.

This proposal prepared the ground for what is now article 16 of the Statute. Canada added to the Singapore proposal by suggesting the

372. Morten Bergsmo & Jalena Pejic, *Deferral of Investigation or Prosecution*, in COMMENTARY ON THE ROME STATUTE, *supra* note 25, at 373, 377.

373. *Id.* at 375.

374. Yee, *supra* note 207, at 150. It is interesting to note that not even the nine affirmative votes requirement succeeded in preventing the Security Council from invoking the right of deferral. In the first test to current article 16, the Council successfully adopted Resolution 1422. The resolution prevents the ICC from investigating or prosecuting cases involving current or former officials or personnel from a contributing State not a Party to the Rome Statute, over acts or omissions relating to a United Nations established or authorized operation. S.C. Res. 1422, U.N. SCOR, 4572d mtg. at 1, U.N. Doc. S/Res/1422 (2002); *see generally* Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 Vand. J. Transnat’l L. (forthcoming November 2002).

375. U.N. CHARTER art. 27(3). Accordingly, matters treated by the Security Council as falling within the category of “other matters” as set out in article 27(3) have included, *inter alia*, those relating to the discharge of its responsibility for the maintenance of international peace and security. These matters require nine votes including the “concurring votes of the permanent members.” *See* CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, *supra* note 60, at 215.

twelve-month renewable deferral period³⁷⁶ and Costa Rica further proposed that deferral be requested by a “formal and specific decision” of the Security Council. The United Kingdom was the first permanent Security Council member to support the change of emphasis in ICC-Security Council relations as provided for in Singapore’s amendment. It was a British text for article 10(2) (formerly article 23(3) of the ILC Draft Statute), introduced at the March–April 1998 PrepCom session, that served as a basis for the final wording of what is now article 16.³⁷⁷

Some conclusions and observations can be drawn in regard to the drafting history of article 16. First, political considerations were given as much, if not more, weight than legal arguments in the determination of the appropriate role of the Security Council in ICC proceedings. Secondly, the Security Council’s deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Finally, article 16 provides an unprecedented opportunity for the Council to influence the work of a judicial body.³⁷⁸ In practice, this opportunity could provide a legal obstacle to the Court’s proper functioning.

Article 16 allows the Council to request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action—or the threat of it—might harm the Council’s efforts to maintain international peace and security pursuant to the U.N. Charter. The Statute did not define this reference to the terms “investigation” and “prosecution.” The Statute indicates that an investigation involves action that may be taken with respect to both a situation and/or an individual, while a prosecution comprises only actions taken with respect to a specific person. The Prosecutor upon the referral of a situation either by a State Party to the Statute or by the Security Council initiates investigations. They comprise the totality of investigative actions undertaken by the Prosecutor under the ICC Statute after an investigation has started in order to ensure the confirmation of charges against an individual suspected of having committed crimes within the Court’s jurisdiction.³⁷⁹ Inevitably, the Prosecutor, after having evaluated the information

376. Gargiulo, *supra* note 359, at 88.

377. Bergsmo & Pejic, *supra* note 372, at 376. Pursuant to the UK proposal, which was also included in the Draft ICC Statute forwarded by PrepCom to the Rome Conference,

no investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council [acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Id.; see also 1998 Draft Final Act, *supra* note 116, art. 10.

378. Bergsmo & Pejic, *supra* note 372, at 377.

379. *Id.* at 378.

available, will initiate an investigation if she or he finds that there is a reasonable basis to proceed. Accordingly, one could conclude that there is still a step before an investigation that the Prosecutor is not precluded from taking, even though the Security Council asked for a deferral under article 16. The Statute clearly makes it possible for the Prosecutor to conduct a preliminary examination as described in article 15, evaluate the information made available to him or her,³⁸⁰ seek "information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate," and receive "written or oral testimony at the seat of the Court."³⁸¹

The wording of article 16 is vague in terms of its application and might cause obstacles in its interpretation. Article 16 provides that "no investigation or prosecution may be commenced or proceeded with" after a Security Council request to defer it has been issued. Thus, the first question is when is an investigation or prosecution "commenced"? It could be suggested that the commencement of an investigation does not depend on how the Court's jurisdiction is triggered. The investigation is commenced when the Prosecutor determines that there is a "reasonable basis to proceed"³⁸² and renders a decision to that effect. It is obviously a step beyond the preliminary examination, and probably by virtue of the decision of the Pre-Trial Chamber, if the Prosecutor is acting *proprio motu*.³⁸³

The wording of article 16 not only prevents the start of an investigation or prosecution, but also stops an investigation or prosecution already underway. However, the issuance of a deferral once proceedings have begun might create practical problems. For example, does such a deferral request mean that a person arrested by a custodial State must be set free? Alternatively, must a person who appeared before the Court pursuant to a request for surrender in accordance with article 89(1), stay in custody until the lapse of the twelve-month period or whenever the Council decides otherwise? What precautions are required for the preservation of evidence? Neither the Statute nor the Rules of Procedure and Evidence appear to have definite answers to these questions.

An answer concerning the question of custody can be found by examining the nature of the decision of deferral. Security Council decisions bind all States. However, do the effects of the decision to defer prosecution go beyond stopping the proceedings? In other words, a lit-

380. ICC Statute, *supra* note 1, art. 53(1).

381. *Id.* art. 15(2). All of these steps are considered proceedings taken before the commencement of the investigation. Thus, article 16 does not cover such steps.

382. *Id.* arts. 15(3), 53(1).

383. *Id.* pmb. ¶ 4.

eral reading of article 16 suggests that its application is limited to a certain phase, to blocking the commencement of an investigation or prosecution, or stopping ongoing proceedings. Thus, according to a strict construction, the article does not suggest that a decision of deferral means that the person is not incriminated any more. This is merely a procedural decision made by the Council, based on political reasons, to suspend the ongoing proceedings for a period of time and for specific reasons related to the maintenance of international peace and security. Thus, after the lapse of the specified period, the Prosecutor could proceed if the Council did not renew the deferral. Accordingly, the matter of setting free the person in custody seems to be discretionary and does not depend on the Council's decision, since this matter is not a legal effect arising from that decision.³⁸⁴ Any other construction would mean that the Council is fulfilling the role of a judicial body, and this construction is, as previously mentioned, one the drafters did not want. One could further suggest that in the context of dealing with the most heinous crimes, the accused should not be freed. However, this outcome conflicts with the right of the accused to "be tried without undue delay"³⁸⁵ whether she or he is in custody or free,³⁸⁶ since the effect of this decision might last for years.³⁸⁷

Meanwhile, although the Prosecutor may conduct measures of preliminary examination, even after the issuance of a deferral request, those

384. From a humanitarian standpoint, that person may be set free. However, there is a risk that the person may escape.

385. ICC Statute, *supra* note 1, art. 67(1)(c).

386. The International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 54, U.N. Doc. A/6316 (1966); *see, e.g.*, Glenn Ashby v. Trinidad & Tobago, Communication No. 580/1994, Hum. Rts. Comm., ¶ 10.5, U.N. Doc. CCPR/C/74/D/580/1994 (2002); K.T. v. Trinidad & Tobago, Communication No. 677/1996, Hum. Rts. Comm., ¶ 9.4, U.N. Doc. CCPR/C/74/D/677/1996 (2002). In the latter communication, the Human Rights Commission (HRC) made it clear that the right of an accused to be *tried without undue delay* is essential throughout the entire proceedings. It expressed itself in the following words:

[T]he Committee recalls that all stages of the procedure must take place "without undue delay within the meaning of article 14 paragraph 3(c). Furthermore, the Committee recalls its previous jurisprudence that article 14 paragraph 3(c), should be strictly observed in any criminal procedure. In the absence of an explanation by the State [P]arty, the Committee, therefore, finds that a delay of four years and five months between conviction and dismissal of appeal constitutes a violation of article 14 paragraph 3(c).

The above paragraph gives rise to the possibility of accepting a prolonged period of delay, if it is well justified by the State Party. Thus, one might wonder whether a Security Council deferral for prolonged periods could be held as a justification by virtue of threat to the peace or maintenance of peace. *Id.*

387. Luigi Condorelli, *Referral and Deferral by the Security Council*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 294, at 652–53.

measures are entirely inadequate when faced, for example, with the threat of imminent destruction of evidence as mentioned in the third question above.³⁸⁸ However, when faced with such a problem, and absent Security Council guidance, the Prosecutor may apply article 54(3)(f) to "take necessary measures, or request the necessary measures be taken . . . [for] the protection of any person or the preservation of evidence."³⁸⁹

Article 16 poses a further obstacle to the function of the Court because of the number of times a request for deferral may be renewed. It provides that a request for deferral of ICC proceedings may be renewed under the same conditions as the initial one, which means that the renewal must be effected by a Security Council's resolution adopted under Chapter VII of the U.N. Charter. The text contains no limitation on the number of times a request for deferral may be renewed. Theoretically, this means that a deferral could be renewed indefinitely. This is very dangerous and might block the Court's jurisdiction over many cases. Nonetheless, some scholars have argued that the Security Council's resolution is subject to judicial review. Professor Schabas argues "the Court could assess whether or not the Council was validly acting pursuant to Chapter VII."³⁹⁰ This is true, but how could this scenario be performed? Neither the Statute nor the Rules of Procedures and Evidence provide a direct answer to this question. However, one might suggest that since the decision of deferral hampers the exercise of the Court's jurisdiction, the problem touches the essence of jurisdiction *lato sensu*, and thus, the Pre-Trial, Trial, or Appeals chambers could deal with it during the various stages.³⁹¹ The Appeals Chamber shall examine the compatibility of the decision with the requirements of article 16 of the ICC Statute and article 39 of the U.N. Charter, and in so doing, the Court shall ensure that article 39 has been invoked in light of the purposes and principles of the U.N.³⁹²

In conclusion, article 16 in effect seems to function contrary to article 13(b). The Security Council acting in accordance with article 13(b) can grant the Court jurisdiction by referring to the Prosecutor a "situa-

388. At the Rome Conference, Belgium submitted a proposal pointing to the need for "further discussion" of preservation of evidence. See *Bureau Discussion Paper on Part 2*, *supra* note 149, art. 13.

389. The author and Condorelli have similar views but based on different argumentation. See El Zeidy, *supra* note 374; Condorelli, *supra* note 387, at 651–52.

390. SCHABAS, *supra* note 125, at 66.

391. By virtue of articles 15, 19, 57, 64(2) and 82 the aforementioned Chambers have the competence to examine this situation through the various stages. See, e.g., Condorelli, *supra* note 387, at 649–50. He holds the same view and explains in detail how this scenario could be performed.

392. For a detailed discussion regarding the compatibility of the Security Council's decisions with the purposes of the U.N. Charter, see El Zeidy, *supra* note 374.

tion in which one or more” of the crimes referred to in article 5 “appears to have been committed.” However, the Prosecutor has broad discretion and could decide not to proceed in accordance with article 53. Thus, both the Prosecutor and the Court could block the Security Council’s referral. The roles are reversed when it comes to article 16. This time the Security Council has the power to block the Court’s efforts. By asserting that proceeding with this situation threatens the international peace and security the Security Council could prevent the ICC from asserting jurisdiction over any case. One can imagine the negative effect of such a decision on the complementarity regime if a State is “unwilling or unable genuinely” to carry out the investigation or prosecution, and the Council decided to suspend the proceedings an infinite number of times on the basis that this threatens the international peace and security. Would not this practice be a legitimization to impunity? However, article 16 is a small price to pay for keeping the Council happy.

CONCLUSION

In conclusion, the principle of complementarity stems from the notion of State sovereignty and dates back to World War I. Its origin is not limited to the 1994 ILC Draft Statute. Its practice could be traced even to the Treaty of Versailles, when the Allies allowed the Germans to exercise national criminal jurisdiction over their nationals that were suspected war criminals. At the same time, the Allies reserved the right to set aside the German judgments and carry out the provisions of article 228 of the Treaty of Versailles, if Germany failed to do its part. The practice reflected two interlinked ideas, namely, the respect of Germany’s State sovereignty to try the offenders, and the creation of international jurisdiction to try them if Germany failed to act. Although there was no explicit reference to the term or principle of complementarity, the conditional scenario that took place between the German government and the Allies demonstrates that the principle existed. Meanwhile, the early experience of Turkey and the Allies also reflected the identical idea.³⁹³

At the end of World War II, the practice of this principle was evident through the operation and establishment of the International Military Tribunal (IMT). The IMT mirrored the complementarity regime in a different form; the Tribunal tried only major criminals whose offenses had no particular geographical localization, and left the minor criminals to internal criminal jurisdictions.

393. See *supra* notes 13 and 14.

The early attempts to create an international criminal jurisdiction serve as valuable examples to demonstrate that the complementarity concept was established during this era. The 1943 Draft Convention for the Creation of an International Criminal Court, which simply stated that, "as a rule, no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction," is a marvelous example that reflects the prevailing idea of State sovereignty in the mechanism of the complementarity principle.³⁹⁴ The same conclusion could also be reached from the drafting history of the Genocide Convention. The exception to this principle can be seen in the practices of the Ad Hoc Tribunals (the ICTY and ICTR). The Ad Hoc Tribunals were set up on the notion of primacy, which permits unconditional international intervention. However, as observed in the current study, the permanent members of the Security Council endeavored to limit such primacy to the specific situations by construing the ICTY Statute narrowly. Their undermining of primacy reflected their implicit intention, to build a more lenient regime based on complementarity between national jurisdictions and international jurisdictions.

States often deny waiving the right of practicing their national jurisdiction, which is derived from the very essence of sovereignty. This can be observed through the aforementioned examples and through the language of most international instruments, such as the 1949 Geneva Conventions, the Apartheid Convention, and others. The language of these instruments seems to empower States to exercise their national jurisdiction by imposing duties upon them to do so. Since the idea of sovereignty often prevails and persuades States to exercise their national jurisdiction through their domestic courts, therefore, it is hardly imaginable if not impossible that States would accept a permanent international intervention that might defeat or override their sovereignty. This is exactly the situation of the ICC. States demanded to reach an agreement in order to create an international institution with jurisdiction over the most serious crimes of international concern, but also preserve their sovereign rights. Presumably, the practice of such an institution should not override domestic courts, unless the latter fail to carry out their duties. Hence, the only compromise was a regime based on complementarity, which gives priority to domestic courts and makes an exception for the international institution. Such a system reinforces the primary obligation of States to prevent and prosecute the most heinous crimes—obligations which exist for all States under conventional and customary international law.

394. Draft Convention for the Creation of an Int'l Crim. Ct. (London Int'l Assemb.), art. 3(1), LONDON INT'L ASSEMB. — REPORTS ON PUNISHMENT OF WAR CRIMES 324 (1943).

The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime. States that were concerned primarily with ensuring respect for national sovereignty and the primacy of national proceedings were able to accept the provisions governing the principle of complementarity, because they recognized and dealt with these concerns. Where the Court was given authority to intervene, the criteria on which such interventions would be based were clearly defined as objectively as possible. It was argued that the fundamental strength of the Statute's complementarity regime is that the interpretation and application of the provisions is left to the Court itself.

Of course, it could be argued that the regime is far from perfect. Clearly, as mentioned in the current study, there are strengths and weakness in the regime. Some provisions seem to work in favor of States, which inevitably strengthen the first feature of the complementarity regime, while others seem to work in favor of the Court and reinforce the second feature.

For example, through article 18 States are given early notice of the Court's interest in a situation, permitting them to inform the Court of their own investigations and prosecutions. This provision clearly reflects an effective complementarity practice that works in favor of States. On the other hand, this provision reduces the chance for the ICC to assert jurisdiction when it is supposed to intervene. The main problem might arise if the State receiving the information is not acting *bona fide*. In this situation, such notification would be very dangerous to preserving evidence. Moreover, the Rules of Procedure and Evidence render the situation more critical, since rule 52(2) allows the State concerned to seek additional information. Accordingly, this weakens the second feature of complementarity. Inevitably, one could argue that the main goal of inventing a regime of complementarity is to provide States with primary responsibility. While this is true, it could be counter-argued that the regime should not defeat the main purpose of creating an ICC by rendering the Court useless. Nevertheless, article 18(3) and (5) seem to balance the situation by allowing the ICC Prosecutor to supervise the proceedings taken by the national courts. Thus, such provision works in favor of the Court.

Another observation regarding article 18 is that it grants States another chance to challenge the admissibility of a case under article 19. This provision is unclear. What could be the new significant facts or change of circumstances? Would this be a change of the relevant State's intention or attitude? Or did the State, which was rendered unable for reasons regarding collecting evidence and taking action, become able to carry out its proceedings? If this right of challenge could be based on the

change of the State's intention, this might cause a real dilemma. How could the Court trust the State, which showed its bad faith previously, to pursue proceedings concerning the same case? It seems that the drafters' desire to build a strong complementarity regime made them consider these issues through a political scope.

Article 19, which appears to be broader than article 18, poses other critical questions which could affect the appropriate application of complementarity. These questions raise specific problems of interpretation. One such problem, for example lies in the formulation of article 19(2) and the principle of *ne bis in idem*.³⁹⁵ By contrast, the provisions of article 19(8) in conjunction with article 18(6) are significant, and hopefully will assist the Prosecutor to preserve the effectiveness of the Court.

The most interesting provisions relating to complementarity are set out in articles 17 and 20 of the Statute. According to their interpretations, any situation could be reversed. For example, the application of the word "genuine" poses two controversial questions. Does "genuinely" refer to situations where the State's motives are not "genuine" (i.e., are duplicitous or disingenuous) or situations where the State is "really" unable or unwilling to prosecute?³⁹⁶

The wording of article 17 could give rise to different interpretations. For example, paragraph 1 states that the "Court shall determine that a case is inadmissible where: a) the case is being investigated or prosecuted . . . , unless the State is unwilling or unable." Thus, according to one interpretation, the State concerned should have initiated an investigation. A case would be admissible only when the State is unwilling, and in order to decide that a State is unwilling, the Court should apply the criteria set forth under paragraph 2 and should not extend them by analogizing. Thus, from a literal reading of the entire text of article 17, one could conclude that the criteria to determine unwillingness come into play only at the commencement of an investigation and not before an investigation. Accordingly, it could be understood that the Court cannot render a case admissible, if that State has not started its investigation yet. However, if article 17 is to be read in a broader manner, one could conclude that if a State has not conducted an investigation, the case is admissible since this reflects the State's bad intention and unwillingness.

Obviously, the matter of interpretation is left to the Court's discretion. Only the Court could render the Statute effective. According to the current situation, a broad construction would be in favor of international justice, but on the other hand, would have a negative effect on national jurisdic-

395. See ICC Statute, *supra* note 1, arts. 19(2), 20; see also *supra* Part III.

396. *Id.* art. 17.

tion. Thus, the second feature of complementarity would be strengthened, while the first would be weakened.

Another related problem is the formulation of article 17. Among the criteria set out in article 17(1), there is no reference to a situation where the person has been prosecuted and the State decided not to try him or her. Once more, this might cause a legal obstacle, especially if it is to be applied in light of article 19(2)(b).³⁹⁷

Likewise, article 20(3) of the Statute lends itself to different interpretations, which might lead to ambiguity and the malfunction of the Statute. One source of the problems surrounding interpretations of this article is the vagueness of the term "proceedings." Is the term limited to the proceedings taken during the trial stage, or does it cover the entire proceedings, or just the investigation and prosecution as mentioned in the *travaux préparatoires*?³⁹⁸ Moreover, paragraph 3 is silent with respect to whether the trial of the national court should reach a decision, which might also lead to misinterpretation. If paragraph 3 meant that a decision must be reached, then, what kind of decision is required? Is the decision of the court of first instance sufficient? Or should the decision be final?³⁹⁹ Neither the Statute nor the Rules of Procedure and Evidence answer these questions.

The provisions implementing complementarity are complex and often call for difficult subjective assessments by the Court and its Prosecutor. For example, in reviewing a State's unwillingness, the Prosecutor bears the burden of showing sufficient circumstantial evidence to warrant a finding that a delayed movement toward domestic prosecution "in the circumstances is inconsistent with an intent to bring the person to justice."⁴⁰⁰ The ICC Statute is silent on the need for any direct evidence of unwillingness in this case. Moreover, meeting the requirements of this test seems to be very difficult, and might leave room for subjective rather than objective assessments.

Aside from the technical terms set out in articles 17 and 20, the Statute is also silent with regard to the significant issue of the right to waive admissibility. In other words, as article 17 is currently drafted, a State must be found unwilling or unable to investigate before the Court can proceed to exercise jurisdiction. Hence, what would happen in a situation where a State chooses not to proceed and prefers that the Court investigate a case? Can it waive the requirements of complementarity, given that it is willing and able? Or must the Court proceed to declare

397. *Id.* art. 19(2)(b).

398. *See supra* Part III.

399. *Id.*

400. *See, e.g.,* R. v. Finta [1994] 1 S.C.R. 701 (Can.); *see also* Benvenuti, *supra* note 16, at 24–25.

that the State was unwilling? The possibility of waiver was raised during the PrepCom and was included in a footnote in the Draft Statute and Draft Final Act.⁴⁰¹ However, it was not considered at the Conference, as many delegations believed that it should be addressed in the Rules of Procedure and Evidence.⁴⁰²

Potentially, the greatest weakness to the complementarity regime lies in the failure of the Statute to include provisions related to pardons and amnesties. The lacunae may permit a State to investigate, prosecute, convict, and sentence a person, and then pardon the person soon thereafter. The possibility exists, and there is a clear example given in the current study concerning this issue.⁴⁰³ The *travaux préparatoires* will indicate that a proposal existed to cover this possibility but was not included in the Rome Conference.⁴⁰⁴ Furthermore, it has been observed through the current study that the exclusion of such references might lead to a negative impact on the effective functioning of the Court. In addition, this gave rise to some doubts concerning the validity of the Rome treaty itself, which is extremely dangerous.

There are no major problems arising from the provision governing statutes of limitations, since article 29 makes it clear that no statute of limitations could be applied to the crimes within the jurisdiction of the Court. However, the problem arises from the weak provisions of cooperation set out in the Statute, especially those dealing indirectly with third States. The provisions regulating the surrender of persons to the

401. See 1998 Draft Final Act, *supra* note 116, art. 15 n.38. In this respect a footnote was included in the draft, which reads, "[t]he present text of article 15 is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned."

402. Holmes, *supra* note 86, at 78 (arguing waiver is possible). However, one could counter that a State should not be permitted to waive its right to complementarity for two reasons. First, according to paragraph 6 of the preamble to the ICC Statute, which is part of the context of the Statute, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." ICC Statute, *supra* note 1, pmb. ¶ 6. Thus, since this is a duty imposed upon States, the latter should be banned from denying or waiving such a duty. According to article 26 of the Vienna Convention (*pacta sunt servanda*), "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 95, art. 26. Article 31 imposes a duty that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* art. 31. Thus, the wording of the preamble is clear and should be interpreted in conformity with articles 26 and 31 of the Vienna Convention. Second, article 17, which embodies the criteria for determining when the Court should intervene, did not incorporate a situation where a State is willing and able but preferred not to act. The latter situation is nowhere defined under the criteria which trigger the jurisdiction of the Court. According to the notion of complementarity, the Court could act only in the case where the State concerned is unwilling or unable, and not where the State is willing and able, but decided not to act.

403. See *supra* Part IV.

404. Holmes, *supra* note 86, at 76.

Court lack effective enforcement, and could negatively impact other provisions in the Statute, such as statute of limitations provisions.⁴⁰⁵

Finally, the problems of the Security Council's referrals and deferrals might also have significant effects on the complementarity regime. In general the impact of the Security Council's referrals on the principle of complementarity depends merely on the angle through which the provision is seen.⁴⁰⁶

For example, as a check on the power of States, and hence a limit to complementarity, a referral under Chapter VII of the U.N. Charter would override a State's inherent authority to insist on using its own judicial processes. Even though jurisdiction under article 13 is a legal inquiry distinct from admissibility under article 17, a Security Council referral would supersede the State's right to use its own courts as a forum of first resort. While the text of the ICC Statute ostensibly preserves a State's authority to implement complementarity⁴⁰⁷ following a Security Council referral, the obligation of all States to "accept and carry out the decisions of the Security Council" effectively nullifies this right of complementarity.⁴⁰⁸ Furthermore, all Members of the United Nations are obligated to

405. *Id.* at 88–89.

406. In this context, the crime of aggression should be considered as an exception to the principle of complementarity. *See, e.g.*, Int'l Law Comm'n, Report on the Draft Code of Crimes Against the Peace and Security of Mankind, art. 8 (1996). Article 8 reads:

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Id. Thus, the wording of article 8 of the Draft Statute appears to recommend that the international criminal court should exercise jurisdiction over the crime of aggression as an exception to the rights of States to exercise their jurisdiction. However, the latter is not precluded from doing so, if it is willing and able. Although the commentary did not use the words willing or able, an analytical reading of the text suggests this conclusion. Moreover, in the commentary, the drafters made it clear that their intention was pointed toward an international criminal court that complements national jurisdiction rather than exercising exclusive jurisdiction. *Id.* art. 8, cmt. ¶ 4. The Commission expressed itself in the following words, "[t]hus, the international community has recognized the important role to be played by an international criminal court in the implementation of international criminal law while at the same time recognizing the continuing importance of the role to be played by national courts . . ."

407. However, one might wonder how would this authority practice complementarity on the crime of aggression. It is hardly imaginable that aggression, which is a State crime, could be governed by the complementarity regime. Since this crime is often committed by States' leaders, it is impossible to ask those States committing this crime to exercise jurisdiction over their administration. One could suggest, however, that the only possibility for practicing complementarity on the crime of aggression is the change of administration. Thus, the new administration might hand over for prosecution those who are responsible from the previous administration.

408. U.N. CHARTER art. 25.

comply with orders of the Security Council, even if the ICC Statute or any other international agreement would impose conflicting obligations.⁴⁰⁹ Thus, a Security Council referral has the practical effect of creating jurisdictional primacy for the ICC similar to that enjoyed by the ICTY and ICTR.⁴¹⁰ However, other provisions of the Statute if applied to the situation of the Security Council referrals strengthen the complementarity regime. As mentioned previously, article 53 functions in a manner that limits the Council's power. Accordingly, the Prosecutor acting in accordance with article 53(1) could decide that a situation referred by the Council is inadmissible. This provision seems to bring balance to the complementarity regime.

However, the real problem regarding the Security Council lies in the power of deferral. Article 16 is a very dangerous tool, which the Council could use. The broadness of this article leaves a wide room for the Council to block the Court's jurisdiction permanently.⁴¹¹

Complementarity is an intellectually simple concept that masks the deep philosophical and political difficulties that the ICC must overcome if it is ever to become a functioning institution. The drafters of the ICC Statute and the delegates who negotiated the Rules of Procedure and Evidence clearly understood that the ICC should not be the Court of first resort. However, the political will which prevailed during the whole drafting process led to the ignorance of some of the significant legal issues. These issues inevitably will cause problems for the Prosecutor and the Court when the Statute comes into play. The provisions addressed in this Article make this fact self-evident and are formulated in a manner which reflects the continuous tension between national jurisdiction and the ICC. Nevertheless, the Court could overstep these obstacles if it deals with the situations on a case-by-case basis. Some cases will require a broad construction of the Statute, while others will require restricting the reading of some provisions. Furthermore, it is clear that the Statute lacks any direct form of enforcement. Thus, the effectiveness of the Court will rely solely on States' cooperation. States themselves could make the ICC effective, and could render it useless. One might argue how could an "unwilling" State be requested to cooperate?

409. *Id.* art. 103.

410. Newton, *supra* note 121, at 49–50.

411. However, it could be argued that blocking the Court's jurisdiction is not as easy as it appears, since the Security Council's decision requires the majority's affirmative votes (nine votes). Nevertheless, the situation of blocking the Court's jurisdiction is far from hypothetical, since the five permanent members could use political or economic pressures, for example, in order to gain their votes. This is exactly what happened recently through the adoption of Security Council Resolution 1422. See El Zeidy, *supra* note 374.

There are some other concerns regarding the Statute, that were addressed by ICTY Prosecutor Louise Arbour when she argued essentially that the regime would work in favor of rich, developed countries and against poor countries.⁴¹² This is because the ICC and its Prosecutor can reasonably be expected to develop some guidelines and standards for evaluating domestic systems. These standards if assessed in light of the systems of the rich countries, would probably not be met by the poor countries.

In light of the foregoing, one might wonder how would the Prosecutor and the Court operate effectively in light of the exception to disclosing information and documents based on national security found in article 72 of the Statute? A literal reading of articles 18(6), 19(8) and 72 suggests that the latter has a negative effect on the application of the former. It seems that the drafters intended to block the Court's jurisdiction whenever they demanded and trigger the complementarity principle whenever it is suitable. Only time and the effective functioning of the Court will answer the abovementioned concerns.

412. SCHABAS, *supra* note 125, at 68.